Supreme Court, U.S.
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No. 92-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

ERNEST DAVIDSON, DARLENE DAVIDSON,
Individually and as Guardians ad Litem
of SHERENE DAVIDSON AND ERNEST DAVIDSON, JR.,
their minor children,
Petitioners,

v.

VELSICOL CHEMICAL CORPORATION, an
Illinois Corporation,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Nevada

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether section 136v of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, preempts state common law tort claims based on inadequate labeling of pesticides.

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Nevada is reported at 108 Nev. Adv. Ops. No. 103, 834 P.2d 931 (Nev. 1992) and is reproduced in the petitioners' appendix (Pet.App.) at 2a -19a. The Judgment is reproduced at Pet.App. 1a-2a. The decision of the District Court for Clark County, Nevada, entitled Order Re: Post-1979 Label Changes is reproduced in the Pet.App. at 20a-25a. The Order of the District Court for Clark County, Nevada, Certifying Final Order For Interlocutory Appeal was filed on June 5, 1991 and is reproduced in the Pet.App. at 26a-32a.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on August 12, 1992. *See* Pet.App. 1a. Petitioner filed a timely petition for rehearing on August 27, 1992, which the Nevada Supreme Court denied on November 3, 1992. *See* Pet.App. 33a. On January 8, 1993, Justice O'Connor signed an Order extending the time within which to file this petition to and including March 1, 1993. *See* Pet.App. 35a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTE INVOLVED

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, provides in pertinent part as follows:

> § 136v. Authority of States
>
> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

STATEMENT OF THE CASE

This is a common law action under Nevada law for severe personal injuries and property damage caused by an inadequately labeled pesticide. On July 27, 1979, an applicator working for former defendant Bill Beckmyer's Pest-A-Way (Pest-A-Way) broadcast sprayed defendant Velsicol Chemical Corporation's (Velsicol) Gold Crest Termide over the dirt area of a crawl space under the Davidsons' home living quarters. Gold Crest Termide contained the active ingredients chlordane and heptachlor.[1]

At the time, Velsicol knew that broadcast spraying posed a danger to human life and that applicators were broadcast spraying its termiticides in crawl spaces. Its label, however, did not specifically prohibit the practice. The very next year, Velsicol changed its label to include a specific prohibition against broadcast spraying. In a November 6, 1984 letter from its Regulatory Coordinator to the Nevada Department of Agriculture, it acknowledged the inadequacy of its label:

> [W]ithout a strict prohibition on the label, some pest control operators applied termiticides to crawlspaces as a broadcast spray. In mid-1980, a specific statement was added to the label to end this practice.

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[1] The EPA banned agricultural uses of chlordane and heptachlor in 1975. One of the uses still permitted was termite control. *See* 39 Fed. Reg. 11,298 (Nov. 24, 1976), *cert. denied sub nom.*, *Velsicol v. E.P.A.*, 431 U.S. 925 (1977). In July of 1987, in the face of an imminent EPA cancellation proceeding, Velsicol agreed voluntarily to cancel its registration for termite control use. *See National Coalition Against Misuse of Pesticides v. E.P.A.*, 867 F.2d 636, 639 (D.C. Cir. 1989).

as a broadcast spray. In mid-1980, a specific statement was added to the label to end this practice.

In 1984, the Nevada Department of Agriculture held a hearing to investigate Pest-A-Way's broadcast application of the Davidsons' home. Relying on Velsicol's 1984 letter, the Hearing Examiner found Velsicol blameworthy for the misapplication because 1) Velsicol acknowledged that its 1979 label did not prohibit broadcast spraying of crawl spaces; and 2) the lack of a prohibition against broadcast spraying was construed by applicators to permit that technique. Prompted by the Hearing Examiner's findings, coupled with chronic health problems the family was experiencing, the Davidsons filed suit for themselves and their minor children against Pest-A-Way and Velsicol on March 20, 1986.[2]

On July 23, 1988, the Washington Analytical Laboratories, Inc. conducted an on-site inspection of the Davidson home and took samples. Analysis of the samples indicated unhealthy levels of chlordane and heptachlor still in the home and on the children's clothing. The Davidsons then vacated their residence and filed an amended complaint. The amended complaint seeks relief under Nevada state common law theories of negligence and strict liability, including failure to provide adequate warnings and failure to instruct on the proper application of a product. The Davidsons seek compensatory and punitive damages for chronic health problems, the spontaneous abortion of a genetically and

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[2] The Davidsons settled their claims against the applicator for the misapplication in the Davidson home. The Nevada Supreme Court affirmed that the settlement was made in good faith. *Velsicol Chemical Corp. v. Davidson*, 811 P.2d 561 (Nev. 1991).

physically deformed fetus in 1980, the fear of developing life-shortening disease, and damage to their property.[3]

On January 23, 1991, the Davidsons filed a motion *in limine* asking the trial court to rule that evidence of Velsicol's post-accident label change would be admissible at trial. Velsicol filed a counter-motion *in limine* on February 4, 1991. The District Court of Clark County denied the Davidsons' motion and granted Velsicol's motion on April 5, 1991, reasoning that FIFRA impliedly preempts state common law tort actions based on an inadequate labeling theory. Pet.App. at 21a-23a.[4]

On April 24, 1991, the Davidsons filed a "Motion For Rehearing And Reconsideration And/Or For Certification For Interlocutory Appeal Of This Court's Order Of April 5, 1991." The court denied the Motion For Reconsideration, but certified its April 5, 1991 Order for interlocutory appeal to the Nevada Supreme Court. Pet.App. at 26a-31a. In so doing, it found that its prior order was, in fact, an Order Granting Partial Summary Judgment in favor of Velsicol concerning all claims based on the inadequacy of Velsicol's label. Pet.App. at 29a.

In a decision filed after this Court's opinion in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), the Nevada Supreme Court noted that there was "a split of

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[3] Since the Davidsons' allegations were not challenged in the motion that resulted in summary judgment being entered for Velsicol on federal preemption grounds, the complaint's allegations should be taken as true.

[4] The court ruled that "all evidence relating to post-1979 Gold Crest Termide label changes shall be excluded from evidence at the trial of this matter." Pet.App. at 23a.

authority" on FIFRA preemption and noted appellate and trial court cases on both sides of the question. Pet.App. at 6a. It then affirmed the Clark County court's finding. Pet.App. at 18a.

In the first part of its analysis, the Nevada Supreme Court reviewed the language of FIFRA's preemption provision, 7 U.S.C. § 136v(a)-(b), and held that it does *not* expressly preempt inadequate labeling claims. It found that, "[S]ection 136v(b) makes no reference to the pre-emption of state common law remedies. Because Congress has expressly pre-empted common law in other pre-emption clauses, Congress' silence cannot be ignored -- it is inimical to a finding of express pre-emption." Pet.App. at 8a.

Instead of ending its analysis after this determination, as *Cipollone* mandates, 112 S.Ct. at 2618, the court then undertook an implied preemption analysis. It stated:

> Our opinion is consonant with *Cipollone* in that we address implied pre-emption only after concluding that FIFRA does not expressly pre-empt such claims ....
>
> We do not find *Cipollone* instructive on whether FIFRA pre-empts the Davidsons' claims .... Perhaps Justice Blackmun articulated it best in *Cipollone* when he stated: "I can only speculate as to the difficulty lower courts will encounter in attempting to implement the Court's decision." *Cipollone*, [112 S.Ct. at 2631].

Pet.App. at 6a.

The Nevada Supreme Court then held the Davidsons' inadequate labeling claims impliedly preempted. Pet.App. at 14a. It announced that, in its view, FIFRA occupies the entire field of pesticide labeling and common law inadequate labeling claims would directly conflict with FIFRA. Pet.App. at 17a.

On August 27, 1992, the Davidsons petitioned the Nevada Supreme Court to reconsider its decision on the ground that it ignored this Court's holding in *Cipollone*. On November 3, 1992, the Nevada court denied the petition. Pet.App. at 33a.

REASONS FOR GRANTING THE WRIT

For 14 years after FIFRA was amended in 1972, no reported decision suggested that FIFRA's preemption provision prevented pesticide poisoning victims from pursuing any state common law claims. Indeed, in the only reported decision during that period on the subject, the D.C. Circuit held that FIFRA does *not* preempt common law claims. *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1539 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). During those years, untold numbers of pesticide poisoning victims, who are afforded no compensation under FIFRA, successfully sought and obtained compensation from pesticide manufacturers. These damage actions also spurred the manufacturers to improve their labels.

In 1986, the Third Circuit issued its since-rejected decision in *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1043, (1987), *after* remand, 893 F.2d 541 (3d Cir. 1990), *rev'd in part, aff'd in*

part, 112 S.Ct. 2608 (1992), finding all inadequate labeling claims brought by cigarette smokers after 1965 impliedly preempted. Despite the myriad differences between cigarette legislation and FIFRA (including the fact that the former dictates the language of cigarette labels, while the latter leaves labeling decisions to pesticide manufacturers), the pesticide manufacturers started urging the courts to apply the Third Circuit's logic to FIFRA.

Relying on the Third Circuit's decision in *Cipollone* or on its progeny, a number of trial courts throughout the nation began adopting the pesticide manufacturers' arguments. In 1991, in *Papas v. Upjohn*, 926 F.2d 1019 (11th Cir. 1991), *vacated and remanded sub nom. Papas v. Zoecon Corp.*, 112 S.Ct. 3020 (1992), the Eleventh Circuit became the first appellate court to find common law claims impliedly preempted by FIFRA. Prior to this Court's decision last term in *Cipollone*, several other appellate and trial courts followed suit. *See, e.g., Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir.), *vacated and remanded sub nom. Arkansas-Platte & Gulf Partnership v. Dow Chemical Co.*, 113 S.Ct. 314 (1992), *on remand*, No. 91-1085 (January 5, 1993), *motion for reconsideration denied* (Feb. 9, 1993). Shortly after deciding *Cipollone*, and recognizing that its analysis in that case would shape the determination of FIFRA preemption, this Court vacated the Eleventh Circuit's decision in *Papas*, *supra*, and the Tenth Circuit's decision in *Arkansas-Platte*, *supra*, and remanded them for reconsideration.

While many hoped that *Cipollone* would resolve the issue, the confusion and conflict among the lower courts remains. This muddled and unjust state of the law should no

longer be countenanced. This Court should accept *certiorari* or, in the alternative, summarily reverse the decision below.

A. The Lower Federal and State Courts Are Split Irreconcilably On Whether FIFRA Preempts Common Law Inadequate Labeling Claims.

Courts before and after *Cipollone* have been divided over whether FIFRA preempts state common law claims of inadequate labeling. Without guidance from this Court, the currently confused state of the law will only continue.

1. Before *Cipollone*.

Before this Court issued its opinion in *Cipollone*, five appellate courts ruled on whether FIFRA preempts state common law tort actions. The only two that squarely considered the issue both found that FIFRA does not expressly preempt *any* common law claims. *Ferebee*, *supra*, 736 F.2d at 1529; *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992). These two courts also found no implied preemption. The other three appellate courts disagreed, however, following the now-rejected reasoning of the Third Circuit's decision in *Cipollone*, or its progeny, and finding implied preemption.[5]

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[5] *Papas*, *supra*; *Arkansas Platte*, *supra*, and *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir.), *on remand*, No. HAR 90-1424, 1992 WL 368062 (D. Md. Nov. 30, 1992), *appeal filed*, No. 93-1003 (4th Cir. Dec. 29, 1992)(using classic implied preemption terminology, the 4th Circuit held failure to warn claims preempted because they "conflict" with FIFRA).

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Lower court opinions showed a similar conflict. After the Third Circuit's decision in *Cipollone*, federal district courts variously held state common law inadequate warning claims expressly preempted,[6] impliedly preempted,[7] and not preempted at all.[8] The numerous opinions from lower state courts on this preemption issue likewise showed a widespread conflict.[9] Simply put, the courts were

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[6] *See Herr v. Carolina Log Bldgs., Inc.*, 771 F. Supp. 958 (S.D. Ind. 1989); *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799 (M.D. Fla. 1989); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987).

[7] *See, e.g., Young v. American Cyanamid Co.*, 786 F. Supp. 781 (E.D. Ark. 1991); *Mims v. Mobay Corp.*, No. M-88-157 (S.D. Tex. June 6, 1991); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989).

[8] *See, e.g., Perkins v. Northeastern Log Homes, Inc.*, No. C89-0564-L(M) (W.D. Ky. Feb. 26, 1992); *Montana Pole & Treating Plant v. I.E. Laucks & Co.*, 775 F.Supp. 1339 (D.Mont. 1991), *appeal filed*, No. 91-36201 (9th Cir. Apr. 21, 1992); *Riden v. ICI Americas, Inc., 763 F. Supp. 1500* (W.D. Mo. 1991); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345 (S.D. Ind. 1990); *Darrow v. Vacudyne, Inc.*, No. 88-CV-40467-FL, 1990 U.S. Dist. LEXIS 19564 (E.D. Mich. April 30, 1990); *Cannon v. Chapman Chem. Co.*, No. 88-2252 (W.D. Ark. Mar. 5, 1990); *Brooks v. S.C. Johnson & Son, Inc.*, No. 86-4136 (S.D. Ill. Jan. 10, 1990); *Whitener v. Reilly Indus., Inc.*, No. 87-5224 (S.D. Ill. Oct. 25, 1989); *Cox v. Velsicol Chem. Co.*, 704 F. Supp. 85 (E.D. Pa. 1989); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988); *Villari v. Terminix Int'l*, 692 F. Supp. 568 (E.D. Pa. 1988); *Wilson v. Chevron Chem. Co.*, No. 85 Civ. 762 (JFK) (S.D.N.Y. May 18, 1986).

[9] Cases finding no preemption include *Chavolla v. Shell Chem.*, No. 548003 (Cal. Super. Ct. May 31, 1990); *Perry v. Dow Chem. Co.*, No. CL 88 10227AN (Fla. Cir. Ct. Palm Beach County June 29, 1989); *Privette v. Armour Exterminating*, No. 85-6279 CA (Fla. Cir. Ct. Palm Beach County Feb. 26, 1988 and Mar. 16, 1988); *Packowski v. Orkin Exterminating Co.*, No. 85-46671-NI (Mich. Cir. Ct. Kent County May 5, 1989). Cases finding preemption include *Begley v. Truly Nolan Exterminating, Inc.*, 573 S.2d 1038 (Fla. Dist. Ct. App. 1991); *Southern Colo. Farms, Inc. v. Green*, No. 88 CV 40 (Colo. Dist Ct. Saguache County June 7, 1991); *Fullmer v. Arab Termite & Pest Control, Inc.*, (continued...)

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bedeviled by the FIFRA preemption question before this Court's decision in *Cipollone*. They continue to be baffled today.

2. After *Cipollone*.

At least thirteen state and federal courts have addressed the issue of whether FIFRA preempts state common law claims of inadequate labeling since this Court's decision in *Cipollone*. Using varying analyses, one ruled that claims of inadequate labeling are not preempted[10], six found at least some express preemption,[11] and six found at least some implied preemption.[12] Included among these opinions are four post-*Cipollone* appellate court decisions: *Arkansas-Platte*, *supra*, *Yowell*, *supra*, (Missouri Court of

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[9](...continued)
No. 29C 018907 CT415 (Ind. Cir. Ct. Hamilton County May 24, 1991); *Abelman v. Velsicol Chem. Corp.*, No. 12611 (Md. Cir. Ct. Montgomery County May 17, 1991).

[10] *Couture v. Dow Chemical U.S.A.*, 804 F. Supp. 1298 (D. Mont. 1992).

[11] *Arkansas-Platte*, *supra*; *Brennan v. Dow Chemical Co.*, No. 91-2292 (Fla. Ct. App. Feb. 3, 1993); *Burke v. Dow Chemical Co.*, 797 F. Supp. 1128 (E.D.N.Y. 1992)(only as to affixed labels); *Casper v. E.I. Dupont De Nemours*, 806 F. Supp. 903 (E.D. Wash. 1992); *King v. E.I. Dupont De Nemours*, 806 F.Supp. 1030 (D. Me. 1992), *appeal filed*, No. 92-2381 (1st Cir. Nov. 20, 1992); and *Gibson v. Dow Chemical Co.*, CV 92-30 (E.D. Ky. Oct. 19, 1992).

[12] Cases ruling that FIFRA impliedly preempts state common law tort theories are the instant case; *Jordan v. Southern Wood Piedmont Company*, 805 F. Supp. 1575 (S.D. Ga. 1992); *Burge v. Jones*, CV B-92-022 (S.D. Tex. Nov. 18, 1992); *Worm*, *supra* (claims not alleging that the label is inconsistent with federal law); *Yowell v. Chevron Chemical Co.*, 836 S.W. 2d 62 (Mo. Ct. App. July 13, 1992); and *Bander v. Southern States Cooperative, Inc.*, No. 92-CA-19196 (Md. Cir. Ct. Howard Cty., Dec. 31, 1992).

Appeals), *Brennan*, *supra*, (Florida District Court of Appeals), and the instant case.[13]

The existence of thirteen court opinions on this question in about eight months, which employ a variety of analyses and reach different conclusions, shows the dire state of the law in this area. The confusion has already gone on too long. Only this Court can eliminate it.

The spectrum of division is revealed by four cases which reach different conclusions while trying to apply *Cipollone*.

In *Couture*, *supra*, the court found no preemption for four reasons. First, it applied *Cipollone*'s principle of narrow construction to sections 136v(a) and (b) and concluded that "states are 'free to regulate, through common law remedies, the use and sale of pesticides.'" 804 F.Supp. at 1302, citing *Montana Pole*, 775 F. Supp. at 1344. Second, after finding section 136v(b) "indistinguishable" from section 5(b) of the Federal Cigarette Labeling and Advertising Act of 1965, the court determined that these sections were "expressly designed to preclude states' *rule-making* bodies from mandating labeling and packaging requirements different from those imposed by the EPA pursuant to FIFRA." *Id.* at 1302 (emphasis added). Third, the court found that section 136v(b) "can hardly be interpreted as providing

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[13] In addition, the issue is currently pending before four federal courts of appeal. *See King*, *supra* (express preemption of inadequate labeling claims), *Worm*, *supra*, (implied preemption of some inadequate labeling claims); *Montana Pole*, *supra*, (no preemption); *Parkins v. Mobay Corp.*, No. 1-89-CV-2471-MHS (N.D. Ga. Feb. 11, 1992) (implied preemption of inadequate labeling claims), *appeal filed*, No. 92-8203 (11th Cir. Feb. 25, 1992); and *Papas*, *supra*, (implied preemption of failure to warn claims).

'unambiguous evidence of a clear and manifest purpose of Congress to displace state sovereignty.'" *Id. citing Cipollone*, 112 S.Ct. at 2625-26. Fourth, again citing *Cipollone*, the court concluded that it must remain "circumspect in applying a broad preemption analysis which would displace state law and would extinguish an individual's right under state law to pursue a common law damage action." *Id.*

The Tenth Circuit, in *Arkansas-Platte*, *supra*, originally found implied preemption of a failure to warn claim. After this Court vacated that judgment and remanded for consideration in light of *Cipollone*, the Tenth Circuit found the claim *expressly* preempted. The court compared § 136v(6) with § 5(b) of the 1969 Act in *Cipollone* and found their proscriptions equally broad -- both encompassing state legislative and common law activities. It did not distinguish among methods of labeling and packaging. *Arkansas-Platte*, *supra*, slip op. at 6-7.

The court in *Burke*, *supra*, reached a somewhat different result. It analyzed FIFRA, its regulatory scheme, and the state of preemption law after *Cipollone*. Its analysis led it to the conclusion that FIFRA expressly preempts a claim that products are mislabeled if an EPA-approved label is affixed to it, but does not preempt claims alleging that warnings other than labels or packaging should have been used. 797 F.Supp. at 1140. It held off deciding, pending the conclusion of discovery, whether there is preemption of negligence and design defect claims. *Id.* at 1141, 1142.[14]

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[14] The court did state that, "It is not conceivable that any New York state court would now find FIFRA to have completely preempted all state tort law." 797 F.

(continued...)

While they reached somewhat different results, *Couture* and *Burke* both agreed that FIFRA does not *impliedly* preempt any state common law theories. *Arkansas-Platte* found express preemption, and did not reach implied preemption on remand. In this case, however, the Nevada Supreme Court also cited *Cipollone*'s principles, but improperly concluded that FIFRA impliedly preempts the Davidsons' inadequate warning claims. *Infra* section B. Clearly, there is a problem that needs to be addressed.

Further delay by this Court in resolving the important issue on which these and the other courts disagree -- whether FIFRA preempts inadequate labeling claims -- will only compound the current confusion in the law, and add to the injustice it creates. Despite plain Congressional intent to leave pesticide poisoning victims' common law rights undisturbed, whether injured victims can pursue their claims now depends upon where they live. The instant case presents the issue clearly and without procedural defect. It is a perfect vehicle for ending the state and lower federal court second-guessing about the result this Court would reach.

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[14](...continued)
Supp. at 1142. Citing *Ferebee*, it also addressed the relationship between compliance with federal regulatory standards and liability under state tort law.

> As a general rule, compliance with federal standards does not, in and of itself, immunize a manufacturer or retailer from state law tort liability.... That EPA must determine whether a pesticide "will perform its intended function without unreasonable adverse effects on the environment" under 7 U.S.C. § 136a(c)(5)(C), does not supplant the state's power to render a judgment as to the relative risks and benefits of the product.

797 F.Supp. at 1142.

B. The Nevada Supreme Court's Ruling Clearly Conflicts With This Court's Ruling In *Cipollone*.

Although the Nevada Supreme Court was aware of, and even quoted extensively from, this Court's decision in *Cipollone*, the court's decision finding implied preemption contravened a basic tenet of the *Cipollone* analysis:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority, ... there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

112 S.Ct. at 2618 (1992). *See* Pet.App. at 6a n.2 for quotation by the Nevada Supreme Court.

Cipollone mandates that: 1) a court's task during preemption analysis is to ascertain Congressional intent; 2) in conducting this analysis, the court presumes that the historic police powers of the states, including the states' tort remedies, are not superseded; and 3) the presumption against preemption is rebutted only if preemption is the clear and manifest intent of Congress. *Cipollone*, *supra*, 112 S.Ct. at 2617. The first part of the Nevada high court's Order, its analysis of whether FIFRA expressly preempts state tort claims, followed these principles. Pet.App. at 7a-9a. After reviewing decisions coming out on both sides of this issue, the court concluded that there is no express preemption.

Under *Cipollone*, the Nevada Supreme Court should have ended its analysis at that point. But it did not stop there. Instead, it proceeded to apply an implied preemption analysis to the question of Congressional intent in FIFRA, and ultimately found implied preemption.

Had the Nevada Supreme Court terminated its analysis after finding no express preemption under FIFRA, it would have remained in line with *Cipollone*'s dictates. The principle the court failed to apply, however, is basic and essential to a proper analysis. For that reason, this Court should either accept *certiorari* to correct the error or summarily reverse the Nevada high court's implied preemption holding in favor of its initial holding that there is no express preemption under FIFRA.

C. The Nevada State Court Erroneously Decided An Important Federal Question: Whether FIFRA Preempts State Common Law Inadequate Labeling Claims.

The final reason why this Court should review this case is because the Nevada Supreme Court decided an important question of federal law erroneously: whether FIFRA preempts state common law inadequate labeling claims. While the Nevada high court properly held that FIFRA does not expressly preempt common law claims of inadequate labeling, its finding that FIFRA impliedly preempts those claims is plainly incorrect.

1. FIFRA Does Not Expressly Preempt Inadequate Labeling Claims.

Cipollone mandates that the language of a federal statute be construed "narrowly" and "in light of the strong presumption against pre-emption." 112 S. Ct. at 2621. FIFRA's preemption provision states, in its entirety, "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." As the Nevada Supreme Court properly found, this language, narrowly construed, does not expressly preempt inadequate labeling claims. In addition to the reasons given by that court, there are five primary reasons why this is so.

First, § 136v(b) begins with the words "Such State," referring to a State covered by § 136v(a). Section 136v(a), however, only applies to a State that is *regulating*.[15] In *Cipollone*, the seven-member majority agreed that references to "regulation" only concern positive state enactments, and not common law damage actions. *Cipollone*, 112 S.Ct. at 2619. Because the statutory language on its face only prohibits positive state enactments related to labeling, § 136v(b) simply does not apply to common law claims.

Second, § 136v(b) narrowly prohibits states from imposing or continuing in effect "any requirements for labeling or packaging...." In *Cipollone*, this Court concluded that the much broader language used in the 1969

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[15] Section 136v(a) states: "A State may *regulate* the sale or use of any federally registered pesticide or device in the State, but only if and to the extent that the *regulation* does not permit any sale or use prohibited by this subchapter." (Emphasis added.)

Cigarette Act preempts failure to warn claims primarily because the legislative history of that language reveals that Congress intentionally expanded the provision to encompass such claims.[16] *Cipollone*, 112 S.Ct. at 2619-20. In sharp contrast, Congress has never altered the language of § 136v(b) to expand FIFRA's preemptive effect.

Third, by its terms, § 136v(b) only preempts State-imposed labeling requirements that are "in addition to or different from" those required under FIFRA. Although FIFRA regulations contain a number of requirements regarding labeling, the fact that the EPA has accepted a pesticide's label does not necessarily mean that all FIFRA labeling requirements have been satisfied. Under FIFRA, a pesticide is misbranded, *even if the label is approved*, if the label does not contain a warning that is adequate to protect health and the environment. 7 U.S.C. § 136(q)(1)(F)-(G).[17] Indeed, the EPA has recognized that "[f]or liability reasons, companies often voluntarily provide additional information on the label, particularly in the area of precautionary statements." 49 Fed. Reg. at 37,960-61 (Sept. 26, 1984).

Fourth, the wide latitude the EPA gives to pesticide manufacturers to decide the language of pesticide labels (particularly compared to the specific labeling commands that

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[16] The 1969 Act provides: "No requirement *or prohibition based on smoking and health* shall be imposed *under State law with respect to ... advertising or promotion* ..." 15 U.S.C. §1334 (Emphasis added). Each of the separately underlined phrases in this provision independently broaden its reach beyond that of § 136v(b) of FIFRA.

[17] *See* 7 U.S.C. § 136a(f)(2) (the fact that the product was registered with the EPA is no defense to a misbranding charge); § 136d(a)(2) (ongoing obligation to provide the EPA with relevant information).

Congress gives cigarette manufacturers) confirms that § 136v(b) does not expressly preempt common law labeling claims. Under the FIFRA registration scheme, the drafting of the label is left to the registrant. 7 U.S.C. § 136a(c)(1)(C); 40 C.F.R. § 152.50(e). Similarly, it is the registrant who decides that a label change is necessary, who drafts a revised label, and who submits it to the EPA for review. 40 C.F.R. § 152.44. Many label revisions require only EPA notification, not agency approval, 40 C.F.R. § 152.46(a), and some revisions do not require any EPA notification, such as changes in non-mandatory label statements, additions required by other federal laws, or changes in the label format. 40 C.F.R. § 152.46. *See also* §§ 152.130(b) & (c); § 152.132(d)(5).

Fifth, the legislative history of FIFRA demonstrates that § 136v(b) does not expressly preempt common law claims. The legislative history of the 1972 version of FIFRA does not support the assertion that Congress intended to preempt common law claims when it enacted § 136v(b). *See, e.g.*, S. Rep. No. 838, 92d Cong., 2d Sess. (1972). Moreover, Congress *ratified* the D.C. Circuit's 1984 finding in *Ferebee*, *supra*, that § 136v(b) *does not preempt* common law claims when it extensively revised the statute in 1988. At that time, Congress amended FIFRA's preemption provisions by adding the heading "Uniformity" to § 136v(b). Other than this cosmetic change, however, Congress did not address the preemption issue. Under well-established rules of construction, this non-substantive amendment indicates Congressional ratification of *Ferebee*. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

2. The Court Below Erred in Finding Implied Preemption.

This Court held in *Cipollone* that, when a statute contains an express preemption provision that does not preempt state common law claims, a court may not reach the question of implied preemption. *Cipollone*, *supra*, 112 S. Ct. at 2618. For this reason, the Nevada Supreme Court's finding of implied preemption, and its reasoning behind it, is clear error.

First, the Nevada Supreme Court's conclusion that Congress intended FIFRA to "occupy the field" of pesticide labeling is erroneous. To the extent that FIFRA arguably evidences Congressional intent to limit state action in any "field," it is the "field" of "pesticide labeling regulation" and, even then, FIFRA explicitly preserves the power of the states to "regulate the sale or use" of any pesticide as long as the regulations are not "in addition to or different from" what is required under FIFRA. §§ 136v(a)-(b); *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476 (1991). Moreover, the "field" at issue in this case is the "field" of pesticide victim compensation and, as Congressional ratification of *Ferebee* in 1980 confirms, Congress intended to leave the powers of the states in this "field" untouched.

Second, as the above discussion of FIFRA's labeling requirements makes clear, there is no conflict between EPA regulations and state liability for common law failure to warn. On the contrary, state common law liability for failure to warn enhances the EPA's regulatory efforts by providing pesticide manufacturers with an incentive to improve their labels and products on their own. *See*, *e.g.*, *Thornton v.*

Fondren Green Apartments, 788 F.Supp. 928, 932 (S.D. Tex. 1992).[18]

FIFRA simply does not preempt common law inadequate labeling claims.

CONCLUSION

The Court should grant this petition for a writ of *certiorari* or, in the alternative, summarily reverse the Nevada Supreme Court's holding of implied preemption in favor of its initial holding that there is no express preemption under FIFRA.

Respectfully submitted,

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March 1, 1993

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[18] This is particularly important because, despite the laudatory goals of federal pesticide regulation, the EPA has not been able to fully review the safety of a large number of pesticides that are currently on the market. *See, e.g.*, U.S. GAO, Lawn Care Pesticides: Risks Remain Uncertain While Prohibited Safety Claims Continue (1990) (reporting that 32 of the 34 most widely used lawn care pesticides had not been reassessed for their long-term health risks).

IN THE
SUPREME COURT OF THE STATE OF NEVADA

ERNEST DAVIDSON, DARLENE DAVIDSON, Individually and as Guardians ad Litem of SHERENE DAVIDSON AND ERNEST DAVIDSON, JR., their minor children,	)	No. 22464
Appellants,	)	
vs.	)	FILED
	)	Aug. 12, 1992
VELSICOL CHEMICAL CORPORATION, an Illinois corporation,	)	
Respondent.	)	

Interlocutory appeal from an order of the district court granting respondent's motion in limine in a products liability action. Eighth Judicial District Court, Clark County; Joseph S. Pavlikowski, Judge.

Affirmed.

Johns & Johns, Las Vegas,
for Appellants.

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Woodbury, Las Vegas; and
Spriggs & Hollingsworth,
Washington, D.C.,

for Respondent.

Crockett & Myers, Las Vegas; Baron & Budd and Charles S. Siegel, Dallas, Texas; and Arthur Bryant and Priscilla Budeiri, Washington, D.C., for Amicus Curiae Trial Lawyers for Public Justice.

Cory, MacDonald & Van, Las Vegas, for National Pest Control Association.

OPINION

PER CURIAM:

The main issue presented by this appeal is whether the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et. seq. ("FIFRA"), pre-empts state common law actions against the manufacturers of pesticides based on failure to adequately label the pesticides. For the reasons set forth below, we conclude that FIFRA impliedly pre-empts such tort claims.

FACTS

In March of 1986, appellants ("the Davidsons") filed suit against respondent Velsicol Chemical Corporation ("Velsicol"). The Davidsons alleged that in 1979, Bill Beckmeyer's Pest-A-Way ("Pestaway") applied Gold Crest Termide, a termiticide produced by Velsicol, to their partially constructed home. Pestaway sprayed, by a method called "broadcast spraying," the ground in an area intended for the home's crawl space.[1] By broadcast spraying, toxic chemicals allegedly migrated into the Davidsons' home.

The Davidsons claimed that Velsicol failed to give adequate warning and appropriate instructions concerning the application of its product to the foundation of newly constructed residences, namely, that broadcast spraying was inappropriate. They further claimed that as a result, they were exposed to harmful quantities of chemicals contained in Gold Crest Termide and suffered personal injuries. The Davidsons sought compensatory and punitive damages based on failure to warn, negligence and strict liability.

In 1980, after Pestaway had sprayed the Davidsons' home, Velsicol changed its label to provide a strict prohibition against broadcast spraying areas designated for crawl spaces. The Davidsons moved in limine for a ruling that the post-accident label change on Velsicol's Gold Crest Termide be admissible at trial. Velsicol countered in limine,

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[1]The Davidsons contrast broadcast spraying to "rodding and trenching." Broadcast is defined as "[c]ast abroad or all over an area, as seed sown thus rather than in drills or rows." The Living Webster Encyclopedic Dictionary 124 (1975).

seeking a ruling that FIFRA pre-empted state tort claims based on a failure to adequately label or warn and that the evidence of subsequent remedial measures was inadmissible.

The district court ruled that FIFRA impliedly pre-empts state common law tort suits against "manufacturers of Environmental Protection Agency ("EPA")-registered pesticides to the extent that such actions are based on claims of inadequate labeling." The district court also ruled that the evidence of the subsequent remedial measures was inadmissible.

DISCUSSION

Under the Supremacy Clause, U.S. Const., Art. VI, cl.2, state laws which are contrary to, or which interfere with, the laws of Congress are invalid. Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2481 (1991) (citing Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824)). "If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). This intent may be either expressed in the terms of the statute or implied. Mortier, 111 S. Ct. at 2481. Where Congress has expressly provided for pre-emption, resort to the implied pre-emption doctrines is unnecessary; instead, the court need only determine the scope of the pre-emption. Cipollone v. Liggett Group, Inc., 60 U.S.L.W. 4703, 4707 (U.S. June 24, 1992).

In determining whether state law is pre-empted, courts must presume that the historic police powers of the states are not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress. Rice v. Santa

Fe Elevator Corp., 331 U.S. 218, 220 (1947). Tort remedies which compensate for personal injuries are traditionally considered properly within the scope of state superintendence. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963). The burden of establishing pre-emption is on the party seeking to give the statute such effect. Silkwood, 464 U.S. at 255.

The Davidsons argue that FIFRA does not pre-empt its inadequate labeling claims against Velsicol. They cite Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1539 (D.C. Cir. 1984), cert. denied, 469 U.S. 1062 (1985), wherein the United States Court of Appeals for the District of Columbia held that FIFRA does not pre-empt such tort claims.

Velsicol, in turn, argues that the district court properly found that FIFRA pre-empts the Davidson's claims. Velsicol relies on Arkansas-Platte & Gulf v. Van Waters & Rogers, 959 F.2d 158 (10th Cir. 1992), where the United States Court of Appeals for the Tenth Circuit held that state damage actions based on labeling and failure to warn are impliedly pre-empted by FIFRA.[2]

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[2]Velsicol also relies on Papas v. Upjohn Co., 926 F.2d 1019 (11th Cir. 1991). At the time of oral arguments in this case, a petition for writ of certiorari had ben filed in Papas. See 59 U.S.L.W. 3825 (U.S. May 29, 1991) (No. 90-1837). However, since oral arguments, the United States Supreme Court issued a summary order granting certiorari, vacating the judgment and "remand[ing] to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of Cipollone v. Liggett Group, Inc., [60 U.S.L.W. 4703 (U.S. June 24, 1992)]." See Papas v. Zoecon Corp., 60 U.S.L.W. 3878 (U.S. June 29, 1992).

Cipollone involved whether the Public Health Cigarette Smoking Act of 1969 or its 1965 predecessor, the Federal Cigarette Labeling and Advertising Act, pre-empted petitioner's common law claims against several cigarette

There is a split of authority on this issue. Ferebee and Arkansas-Platte represent the two views, and we therefore confine our discussion to these cases.[3]

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manufacturers. Cipollone, 60 U.S.L.W. at 4704. Cipollone announced that if there is a determination of express pre-emption, it is not necessary to infer Congressional intent (through the application of the implied pre-emption doctrines). Cipollone, 60 U.S.L.W. at 4707.

The Papas court apparently contravened the pre-emption analysis set forth in Cipollone by failing to determine whether FIFRA expressly pre-empts state tort claims based on inadequate labeling. See Papas, 926 F.2d at 1024 ("[W]e admit to a little uncertainty and pass over the question of express preemption.") Our opinion is consonant with Cipollone in that we address implied pre-emption only after concluding that FIFRA does not expressly pre-empt such claims (as discussed below).

We do not find Cipollone instructive on whether FIFRA pre-empts the Davidsons' claims; thus, we decline to draw anything further from the Court's summary reconsideration order. Perhaps Justice Blackmun articulated it best in Cipollone when he stated: "I can only speculate as to the difficulty lower courts will encounter in attempting to implement the Court's decision." Cipollone, 60 U.S.L.W. at 4714.

[3]Federal district courts finding pre-emption include Hurt v. Dow Chemical Co., 759 F. Supp. 556 (E.D. Mo. 1990); Kennan v. Dow Chemical Co., 717 F. Supp. 799 (M.D. Fla. 1989); Fisher v. Chevron Chemical Co., 716 F. Supp. 1283 (W.D. Mo. 1989); Herr v. Carolina Log Bldgs., Inc., 771 F. Supp. 958 (S.D. Ind. 1989); Fitzgerald v. Mallinckrodt, Inc., 681 F. Supp. 404 (E.D. Mich. 1987).

Cases in which district courts found no pre-emption include Riden v. ICI Americas, Inc., 763 F. Supp. 1500 (W.D. Mo. 1991); Evenson v. Osmose Wood Preserving Inc., 760 F. Supp. 1345 (S.D. Ind. 1990); Stewart v. Ortho Consumer Products, No. 87-4252, 1991 WL 36129 (E.D. La. 1990); Cox v. Velsicol Chem. Corp., 704 F. Supp. 85 (E.D. Pa. 1989); Roberts v. Dow Chem. Co., 702 F. Supp. 195 (N.D. Ill. 1988).

I. Congress did not expressly pre-empt state tort claims.

Velsicol argues that FIFRA expressly pre-empts state tort claims which are based on failure to adequately label. FIFRA provides:

> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA].
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].

7 U.S.C. § 136v(a) - (b). Based on this language, several courts have held that FIFRA expressly pre-empts state action regarding pesticide labeling. See e.g., Fitzgerald v. Mallinckrodt, Inc., 681 F. Supp. 404, 406 (E.D. Mich. 1987); and Kennan v. Dow Chemical Co., 717 F. Supp. 799, 807 (M.D. Fla. 1989) (pre-emption based on the express language and legislative history).

However, the majority of courts hold that FIFRA does not expressly pre-empt state action of pesticide labeling. See, e.g., Ferebee, 736 F.2d at 1542; Montana Pole & Treating Plant v. I.F. Laucks, 775 F. Supp. 1339, 1343 (D.

Mont. 1991); Riden v. ICI Americas, Inc., 763 F. Supp. 1500, 1505 (W.D. Mo. 1991); Hurt v. Dow Chemical Co., 759 F. Supp. 556, 558-59 (E.D. Mo. 1990); Fisher v. Chevron Chemical Co., 716 F. Supp. 1283, 1286-87 (W.D. Mo. 1989).

We conclude that the majority's position is more persuasive. Although FIFRA provides that states shall not "impose or continue in effect" labeling requirements which differ from FIFRA, section 136v(b) makes no reference to the pre-emption of state common law remedies. Because Congress has expressly pre-empted common law in other pre-emption clauses, Congress' silence cannot be ignored -- it is inimical to a finding of express pre-emption. Riden, 763 F. Supp. at 1505-06. Indeed, as stated by the New Jersey Supreme Court, courts should not strain to find pre-emption of state law:

> [O]ur federal system, with its high regard for the several States' powers of governance requires that judges not preempt state law lightly. . . . [W]hen the Supreme Court considers whether the Congress has preempted state law, "[a]ny indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority."

Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1251 (N.J. 1990) (quoting in part Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 780

(1947)).[4] Therefore, we hold that FIFRA does not expressly pre-empt state tort actions against pesticide manufacturers based on failure to adequately warn or label.

II. Congress implicitly intended to pre-empt state tort claims.

The next question is whether Congress implicitly intended to pre-empt state tort claims. Mortier, 111 S. Ct. at 2481. Congress' intent may be implied if Congress occupies an entire field or if there is an actual conflict between state and federal law. Arkansas-Platte, 959 F.2d at 161.

A. Congress occupies the entire field of pesticide labeling.

Congress occupies an entire field if: (1) the federal regulation is so pervasive such that Congress left no room for the states to supplement it; (2) the federal act involves a field in which the federal interest completely dominates the field; or (3) if the goals sought or the obligations imposed by the federal law reveal a purpose to preclude state authority. Mortier, 111 S. Ct. at 2481-82.

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[4]In the same fashion as Congress could have included a reference to pre-emption of state common law, Congress could have also included a "savings clause" expressly sheltering state common law as it did in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(4) (1982). Fisher, 716 F. Supp. at 1287, n.1. Thus, the lack of reference to state common law is important only because of the presumption against pre-emption. Id.

The Ferebee court recognized that FIFRA does not allow states to directly impose additional labeling requirements. Ferebee, 736 F.2d at 1541. The court, however, reasoned that state action which has the effect of changing federal labeling requirements is permissible because it falls within the states' power to regulate the "sale or use" of pesticides authorized in § 136v(a). Id.

In contrast, the Arkansas-Platte court held that FIFRA impliedly pre-empted state tort actions, reasoning that the federal government occupies the entire field of regulating labels. Arkansas-Platte, 959 F.2d at 164. Our review of the legislative history and the federal regulations supports a ruling that Congress occupies the entire field of pesticide labeling regulation.

In 1947, Congress enacted FIFRA to replace the Insecticide Act of 1910. Mortier, 111 S. Ct. at 2479 (citing 61 Stat. 163). Originally, FIFRA "was primarily a licensing and labeling statute." Id. (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991 (1984)). Increased environmental and safety concerns prompted Congress to comprehensively amend FIFRA in 1972. Id. (citing 86 Stat. 973). These amendments enhanced FIFRA's registration and labeling standards, and the EPA was granted increased enforcement authority. Id. at 2479-80. Thus the 1972 amendments converted FIFRA from a labeling law into a comprehensive regulatory statute. Id. (quoting Ruckelshaus, 467 U.S. at 991).

A House of Representatives' report on the 1972 amendments to FIFRA indicated the proposed authority of the states:

> The States are given prime responsibility for the certification and supervision of pesticide applicators. The Federal Government sets the program standards the States must meet. State authority to change Federal labeling and packaging is completely preempted, and State authority to further regulate "general use" pesticides is partially preempted.

H.R. Rep. No. 511, 92d Cong., 2d Sess. 1-2 (1972) (emphasis added). This report reiterated that:

> In dividing the responsibility between the States and the Federal Government for the management of an effective pesticide program, the Committee has adopted language which is intended to completely preempt State authority in regard to labeling and packaging.

Id. at 16 (emphasis added).

Moreover, in its report to the Senate, the Agriculture and Forestry Committee noted that section 136v(b) "preempts any state labeling or packaging requirements different from such requirements under the Act." S. Rep. No. 838, 92 Cong., 2d Sess. (1972) reprinted in 1972 U.S.C.C.A.N. 3993, 4021 (emphasis added); see also, S. Rep. No. 970, 92d Cong., 2d Sess., reprinted in 1972 U.S.C.C.A.N. 4092, 4128 (the Commerce Committee also stated that § 136v(b)

"pre-empts" any state labeling or packaging requirements).[5]

The 1972 Amendments added 7 U.S.C. § 136v. That section, captioned "Authority of the States," provided in part:

> (a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA].
>
> (b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].

7 U.S.C. § 136v(a) - (b). In 1988, Congress added the title, "In general," to subsection (a) and added the title, "Uniformity," to subsection (b). Pub. L. No. 100-532, 102 Stat. 2654, 2682 (1988).

FIFRA precludes the EPA from authorizing the sale of a pesticide unless the product, as labelled, will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(C). Such effects are defined as: "[A]ny unreasonable risk to man or the environment, taking into account the economical, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb). The label must be such that it is "likely to be read and understood by the ordinary individual under customary

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[5]House Report 10729, which ultimately was enacted as the 1972 amendments, was referred to two committees: (1) the Agriculture and Forestry Committee, and (2) the Commerce Committee. See S. Rep. No. 838, 92d Cong., 2d Sess. (1972), reprinted in 172 [sic] U.S.C.C.A.N. 3993; S. Rep. No. 970, 92d Cong., 2d Sess., reprinted in 1972 U.S.C.C.A.N. 4092 (1972).

conditions of purchase and use." 7 U.S.C. § 136(q)(1)(E).

The EPA cannot approve a pesticide unless it complies with FIFRA's requirements, as set forth in § 136a(c)(5), and the EPA's labeling requirements. 40 C.F.R. § 152.112(f). The EPA has extensively regulated pesticide labeling, see generally 40 C.F.R. § 156 (1991), and provides specific requirements for the contents of each label (including ingredient statements, warnings, and directions for use). 40 C.F.R. § 156.10(a)(1). The EPA details how warnings are to be presented and provides specific requirements for the content, placement, type, size and prominence of the warnings. 40 C.F.R. § 156.10(h).

Also, there must be a statement of practical treatment. 40 C.F.R. § 156.10(h)(1)(iii). If hazards exist to humans and domestic animals, precautionary statements are required which "indicat[e] the particular hazard, the route(s) of exposure and the precautions to be taken to avoid accident, injury or damage." 40 C.F.R. § 156.10(h)(2)(i)(A). Directions for use of the pesticide must be stated in terms which are easy to read and understand by the average person. 40 C.F.R. § 156.10(i)(1)(i). When followed, they must be sufficient to protect the public "from fraud and from personal injury." Id. If a pesticide manufacturer violates either the general requirements of FIFRA or the regulations promulgated by the EPA, the EPA will notify the United States Attorney General who, in turn, will institute criminal or civil proceedings against the violator. 7 U.S.C. § 136g(c)(1).[6]

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[6]Among other things, FIFRA makes it unlawful to sell or distribute a pesticide that is not registered or to alter the EPA-approved composition of the product. 7 U.S.C. §136j(a)(1)(A), (2)(M). In addition, it is unlawful to sell a

We reject Ferebee's reading of FIFRA as it conflicts with the language and legislative history of the statute. First, the excerpts from the legislative history demonstrate that Congress intended section 136v(b) to "completely pre-empt" state authority to change federal labeling. See e.g., H.R. Rep. No. 511, 92d Cong., 2d Sess. 1-2 (1972). Second, it is unlikely that Congress would have designated federal control over labeling in section 136v(b) if it thought that the provision could be circumvented by state action authorized by § 136v(a). Third, federal regulation of pesticide labeling created by FIFRA is "so pervasive" and "so dominant" such that Congress left no room for the states to supplement it.[7]

Therefore, we hold that FIFRA occupies the entire field of pesticide labeling and implicitly pre-empts state tort claims based on failure to adequately label the pesticide.[8]

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misbranded pesticide. (See 7 U.S.C. §136(q)(1) for a description of when a pesticide is misbranded.

[7]Several courts have sidestepped this aspect of FIFRA by finding that FIFRA does not create a comprehensive scheme to pre-empt "all state law claims." See e.g., Riden, 763 F. Supp. at 1506. These courts have approached implied pre-emption too broadly. The dispositive question is whether FIFRA occupies the particular field of pesticide labeling. See Mortier, 111 S. Ct. at 2486 ("Whatever else FIFRA may supplant, it does not occupy the field of pesticide regulation in general or the area of local use permitting in particular.")

[8]This holding is strengthened by the recent United States Supreme Court's decision in Mortier, where the Court noted that the entire field of pesticide regulation was not pre-empted but, in dicta, emphasized that pesticide labeling was pre-empted. Mortier, 111 S. Ct. at 2486; see also Arkansas-Platte, 959 F.2d at 163. In Mortier, the Court stated:

> In the first place, §136v itself undercuts such an inference. The provision immediately following the statute's grant of regulatory authority to the States declares that "[s]uch State shall not impose or continue in effect any requirements for

B. State tort claims conflict with FIFRA.

The final question is whether state tort claims actually conflict with FIFRA. Mortier, 111 S. Ct. at 2482. There is an actual conflict when compliance with both state and federal law is physically impossible, or when a state law obstructs the accomplishment and execution of the full purposes and objectives of Congress. Id.

The Ferebee court concluded that tort damages did not create an actual conflict. Ferebee, 736 F.2d at 1542. The court reasoned that compliance with both FIFRA and state tort law was not impossible because the manufacturer can continue to use the EPA-approved label and can at the same time pay damages to successful tort plaintiffs; alternatively, the manufacturer can petition the EPA for a more comprehensive label. Id. This analysis has been identified as a "choice of reaction" analysis. See, e.g., Hurt, 759 F. Supp. at 559.

The Ferebee court also concluded that state common law did not stand as an obstacle to the accomplishment of

---

> labeling and packaging in addition to or different from those required under" FIFRA. 7 U.S.C. § 136v(b). This language would be pure surplusage if Congress had intended to occupy the entire field of pesticide regulation. Taking such pre-emption as the premise, § 136v(a) would thus grant States the authority to regulate the "sale or use" of pesticides while § 136v(b) would superfluously add that States did not have the authority to regulate "labeling or packaging," an addition that would have been doubly superfluous given FIFRA's historic focus on labeling to begin with.

Mortier, 111 S. Ct. at 2486 (emphasis added).

FIFRA's purposes. The courts stated that such a conflict would exist only if FIFRA was an "affirmative subsidization" of the pesticide industry, not a regulatory statute directed at public safety. Ferebee, 736 F.2d at 1542-43.

In contrast, Arkansas-Platte held that jury awards of damages would result in a direct conflict with FIFRA. Arkansas-Plate, 759 F.2d at 164. We agree. By registering a pesticide, the EPA has determined that the labels are adequate to protect man and the environment because it does not pose "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." A jury determination that a pesticide labeling is inadequate directly conflicts with the EPA's determination that the label is adequate and, secondly, the EPA Administrator's determination that the risks to man and environment are outweighed by the beneficial aspects of the pesticide.

Furthermore, as noted in Arkansas-Platte, such state damage actions would hinder Congress' goal of reaching uniformity in pesticide labeling.[9] Id. at 162. If a jury

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[9]In 1988, Congress amended this section without changing the language of § 136v(b) by adding the heading "Uniformity" to this section. Pub. L. 100-532, § 801(m) (1988).

determined that a label was inadequate, a manufacturer would have to change the label or risk additional suits for damages. These changes would destroy the uniformity sought by Congress because warning labels for that pesticide would not be based on the same criteria the EPA uses to establish warnings for all other pesticides.

Though a manufacturer could "physically" comply with both federal and state requirements as articulated in Ferebee, we reject Ferebee's "choice of reaction" analysis because such jury determinations would realistically force manufacturers to change their labels. "A business choice between paying damages and changing the label is only notional." Id. at 162. Ferebee's "choice of reaction" is more an articulation of semantics, rather than articulation of actual choices. As one court stated:

> This "choice of reaction" seems akin to the free choice of coming up for air after being underwater. Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable than any manufacturer would not immediately take steps to minimize its exposure to continued liability.

Palmer, 825 F.2d 627-28 (discussing the "choice of reaction" analysis under the Federal Cigarette Labeling and Advertising Act).

We conclude that a jury determination that a label is inadequate would directly conflict with the EPA's determination that the label is adequate to protect man and

the environment. National uniformity in pesticide labeling would also be frustrated by state common law tort claims. Therefore, we hold that these claims are pre-empted because they" actually conflict" with FIFRA.

CONCLUSION

In sum, we hold that FIFRA does not expressly pre-empt state tort claims based on inadequate labeling but that FIFRA impliedly pre-empts such claims. Our resolution of this issue makes it unnecessary for us to address the Davidson's remaining contention. Accordingly, for the reasons stated above, we affirm the order of the district court.

/s/_____, C.J.
Mowbray

/s/_____, J.
Springer

/s/_____, J.
Rose

/s/_____, J.
Young

/s/_____, D.J.[10]
Carnahan

[10]The Honorable Lew Carnahan, Judge of the Second Judicial District Court, was designated by the Governor to sit in place of the Honorable Thomas L. Stefen, Justice. New. Const. art. 6, §4.

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

ERNEST DAVIDSON, DARLENE DAVIDSON, Individually and as Guardians ad Litem of SHERENE DAVIDSON AND ERNEST DAVIDSON, JR., their minor children,	)
Plaintiffs,	)
vs.	) CASE NO. A 246535
	) DEPT NO. III
VELSICOL CHEMICAL CORPORATION, An Illinois corporation,	) DOCKET "E"
	) **ORDER RE: POST-1979 LABEL**
Defendant.	) **CHANGES**

Plaintiffs' motion in limine re: post-1979 label changes and Defendant's counter-motion in limine re: post-1979 label changes came on for hearing on February 11, 1991. Plaintiffs were represented by Larry Johns, Esq. of JOHNS & JOHNS, LTD. Defendant was represented by Katharine R. Latimer, Esq. of SPRIGGS & HOLLINGSWORTH and Jay Earl Smith, Esq. of JOLLEY, URGA, WIRTH & WOODBURY. The Court took the matter under advisement after listening to the arguments of counsel for the parties and requesting the submission of additional points and authorities by the parties.

After reviewing the pleadings and papers on file, and after considering the argument of counsel for the parties, the Court hereby finds:

1. The Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, impliedly preempts state common law tort suits against manufacturers of Environmental Protection Agency ("EPA")-registered pesticides to the extent that such actions are based on claims of inadequate labeling.

A. The federal government has occupied the entire field of labeling regulation, leaving no room for the states to supplement federal law, even by means of state common law tort actions.

B. For EPA-registered pesticides, the

warning and use statements present on the label indicate that the EPA has determined that those statements are adequate to protect man and the environment: that the pesticide as labeled does not pose 'any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.'

C. A jury determination, via a state common law tort judgment, that a pesticide's labeling is inadequate results in a direct conflict with the Congressional intent and the EPA's determination that the labeling is adequate to protect against health risks.

D. Allowing state common law tort actions based on labeling claims would wrongfully permit state court juries to do what state legislatures and state administrative agencies are forbidden to do: impose requirements for labeling pesticides.

2. The adequacy of the 1979 Gold Crest Termide label was conclusively established by the EPA and Plaintiffs' tort claim based on the alleged inadequacy of such label is preempted by federal law.

3. Evidence relating to post-1979 Gold Crest Termide label changes is an inadmissible subsequent remedial measure relating to Plaintiffs' claim that Defendant breached its duty of due and reasonable care.

4. Under the circumstances of this case, evidence of any post-1979 Gold Crest Termide label change would unfairly prejudice Defendant and confuse the jury.

Good cause appearing, it is hereby

ORDERED that Plaintiffs' motion in limine re: post-1979 label changes is denied; and it is further

ORDERED that Defendant's counter-motion in limine re: post-1979 label changes is granted; and it is further

ORDERED that all evidence relating to post-1979 Gold Crest Termide label changes shall be excluded from evidence at the trial of this matter.

DATED this 5 day of April, 1991.

JOSEPH S. PAVLIKOWSKI
DISTRICT COURT JUDGE

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DATED: April 3, 1991

Approved as to form and content by:

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DATED: 4-4-91

DISTRICT COURT
CLARK COUNTY, NEVADA

ERNEST DAVIDSON, DARLENE DAVIDSON, Individually and as Guardians ad Litem of SHERENE DAVIDSON AND ERNEST DAVIDSON, JR., their minor children,	)	
Plaintiffs,	)	
vs.	)	CASE NO. A 246535
	)	DEPT NO. III
VELSICOL CHEMICAL CORPORATION, An Illinois corporation,	)	DOCKET "E"
Defendant.	)	

ORDER CERTIFYING FINAL ORDER FOR INTERLOCUTORY APPEAL

Plaintiffs' Motion for Rehearing and Reconsideration, and/or for Certification for Interlocutory Appeal of This Court's Order of April 5, 1991 having come on for hearing on the 20th day of May, 1991, Plaintiffs appearing by and through their attorney, Larry C. Johns, Esq. and Defendant

VELSICOL appearing by and through Brian Holthus, Esq.; the Court having considered Plaintiffs' Motion, together with the arguments of Plaintiffs' counsel, and having considered Defendant VELSICOL's response thereto wherein VELSICOL concurred with Plaintiffs that this Court's Order of April 5, 1991 should be certified as a final order for interlocutory appeal pursuant to NRCP 54 (b), and the Court being fully advised in the premises,

NOW THEREFORE, the Court enters the following Findings and Order.

FINDINGS

I

On April 5, 1991, this Court entered its Order Re: Post-1979 Label Changes, specifically finding

> "1. Thee Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, impliedly preempts state common law tort suits against manufacturers of Environmental Protection Agency ("EPA")-registered pesticides to the extent that such actions are based on claims of inadequate labeling.
>
> > "A. The federal government has occupied the entire field of labeling regulation, leaving no room for the states to supplement federal law, even by means of state common law tort actions.

"B. For EPA- registered pesticides, the warning and use statements present on the label indicate that the EPA has determined that those statements are adequate to protect man and the environment: that the pesticide as labeled does not pose 'any unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of any pesticide.'

"C. A jury determination, via a state common law tort judgment, that a pesticide's labeling is inadequate results in a direct conflict with the Congressional intent and the EPA's determination that the labeling is adequate to protect against health risks.

"D. Allowing State common law tort actions based on labeling claims would wrongfully permit state court juries to do what state legislatures and state administrative agencies are forbidden to do: impose requirements for labeling pesticides.

"2. The adequacy of the 1979 Gold Crest Termide label was conclusively established by the EPA and Plaintiffs' tort claim based on the alleged inadequacy of such label is preempted by federal law.

"3. Evidence relating to post-1979 Gold Crest Termide label changes is an inadmissible subsequent remedial measure relating to Plaintiffs' claim that

Defendant breached its duty of due and reasonable care.

"4. Under the circumstances of this case, evidence of any post-1979 Gold Crest Termide label change would unfairly prejudice Defendant and confuse the jury."

"Good cause appearing, it is hereby

"ORDERED that Plaintiffs' motion in limine re: Post-1979 label changes is denied; and it is further

"ORDERED that Defendant's counter-motion in limine is granted; and it is further

"ORDERED that all evidence relating to post-1979 Gold Crest Termide label changes shall be excluded from evidence at the trial of this matter."

II

That the above Order, although styled and Order granting Motions in Limine, is in fact an Order Granting Partial Summary Judgment in favor of Defendant VELSICOL as to all of Plaintiffs' claims which were based upon the alleged inadequacies of VELSICOL's labeling of its product, Gold Crest Termide, at the time it was applied at the Plaintiffs' home in July, 1979.

III

That this Court's ruling regarding the pre-emptive effect of FIFRA involves purely a question of law and more particularly, an issue of pre-emption of state law and claims based on Nevada law.

That there are no United States Supreme Court or Federal decisions directly on point which are binding upon the courts of Nevada nor has the Nevada Supreme Court had an opportunity to address or resolve the preemption issue involved in this case.

V

That the issue is one of first impression in Nevada, is a fundamental legal issue underlying Plaintiffs' product liability and negligence claims against Defendant VELSICOL and should be certified for Interlocutory Appeal and determination by the Nevada Supreme Court.

VI

That there is no just reason for delay of resolution of this purely legal issue as provided by NRCP 54(b).

NOW THEREFORE, IT IS ORDERED that Plaintiffs' Motion for Reconsideration is denied, and it is further

ORDERED that this Court's Findings and Order of April 5, 1991 is certified as a final order for interlocutory

appeal to the Nevada Supreme Court, and it is further

ORDERED that the trial date of September 16, 1991 is vacated and all pre-trial and discovery matters are stayed pending resolution of the appeal.

DATED AND DONE this 5th day of June, 1991.

JOSEPH PAVLIKOWSKI
DISTRICT JUDGE

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IN THE
SUPREME COURT OF THE STATE OF NEVADA

ERNEST DAVIDSON, DARLENE DAVIDSON, Individually and as Guardians ad Litem of SHERENE DAVIDSON AND ERNEST DAVIDSON, JR., their minor children,	)	No. 22464
Appellants,	)	
vs.	)	
	)	Filed Nov. 3, 1992
VELSICOL CHEMICAL CORPORATION, an Illinois corporation,	)	
Respondent.	)	

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.[11]

[11]The Honorable Thomas J. Steffen, Justice, did not participate in the decision of this appeal.

/s/ _____, C.J.
Mowbray

/s/ _____, J.
Springer

/s/ _____, J.
Rose

/s/ _____, J.
Young

cc: Hon. Joseph S. Pavlikowski,
District Judge
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Jolley, Urga, Wirth & Woodbury
Spriggs & Hollingsworth
Crockett & Myers
Baron & Budd
Arthur Bryant
Priscilla Budeiri
Cory, MacDonald & Van
Loretta Bowman, Clerk

Supreme Court of the United States

No. A-528

Ernest Davidson, et ux., Petitioners,

v.

Velsicol Chemical Corp.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including March 1, 1993.

s/ Sandra Day O'Connor
Associate Justice of
the Supreme Court of the
United States

Dated this 8th
day of January, 1993.

No. 92-1430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ERNEST DAVIDSON, DARLENE DAVIDSON,
Individually and as Guardians ad Litem
of SHERENE DAVIDSON and ERNEST DAVIDSON, JR.,
their minor children,

Petitioners,

v.

VELSICOL CHEMICAL CORPORATION,
an Illinois Corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

---

BRIEF IN OPPOSITION

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April 2, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

RULE 29.1 LIST

Respondent, Velsicol Chemical Corporation, has no parent companies or subsidiaries to list pursuant to Rule 29.1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1430

ERNEST DAVIDSON, DARLENE DAVIDSON,
Individually and as Guardians ad Litem
of SHERENE DAVIDSON and ERNEST DAVIDSON, JR.,
their minor children,
Petitioners,

v.

VELSICOL CHEMICAL CORPORATION,
an Illinois Corporation,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

---

BRIEF IN OPPOSITION

OPINIONS BELOW

On April 5, 1991 the District Court for Clark County, Nevada granted the motion *in limine* of respondent Velsicol Chemical Corporation ("Velsicol") and ruled that petitioners' inadequate labeling claims in this common law tort case were preempted by federal law. That Order is unreported and is reproduced at Pet. App. 20a-25a. On June 5, 1991, the District Court denied petitioners' motion for reconsideration, certified the April 5 Order for interlocutory appeal to the Nevada Supreme Court and stayed further proceedings on the remaining claims pending resolution of the appeal. That Order is likewise unreported and is reproduced at Pet. App. 26a-32a. The opin-

ion of the Supreme Court of the State of Nevada affirming the District Court's *in limine* ruling is reported at 834 P.2d 931 (Nev. 1992) and is reproduced at Pet. App. 1a-19a.

JURISDICTION

The decision of the Nevada Supreme Court was issued on an interlocutory appeal from a pretrial ruling of the District Court that disposed of some but not all of the pending claims in this case. Accordingly, for reasons set forth more fully *infra*, at pages 9-11, the decision of the Nevada Supreme Court is not a "final judgment[] or decree[]." The Court, therefore, lacks jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT

This action asserts claims under various common law theories of negligence and strict liability arising out of petitioners' asserted exposure to Gold Crest Termide, a pesticide manufactured by Velsicol and properly registered and labeled under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. In its ruling below the Nevada Supreme Court held that those of petitioners' claims which challenge the adequacy of Velsicol's product label are preempted by FIFRA, which forbids states to "impose or continue in effect any requirements for labeling or packaging in addition to or different from those" imposed under FIFRA. 7 U.S.C. § 136v(b). Pet. App. 18a. Its decision was the first appellate opinion after this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), to consider FIFRA's preemptive effect on common law claims. Since then two United States courts of appeals have considered the issue, and both have likewise ruled that common law inadequate labeling claims are preempted under FIFRA.[1] These rulings are sound and correct.

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[1] *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993).

1. For the first 25 years of its existence, FIFRA was primarily a licensing and labeling statute. In 1972, however, Congress completely revised and significantly strengthened FIFRA's registration and labeling standards. *See Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991). In the process, FIFRA was expanded to regulate the use of pesticides, as well as their sale and labeling; to reach pesticides produced and sold wholly intrastate, as well as interstate; to provide for review, cancellation and suspension of registrations; and to enhance greatly the enforcement authority of the Environmental Protection Agency ("EPA"). *Id.* In effect, the 1972 amendments "transformed FIFRA from a labeling law into a comprehensive regulatory statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). As amended, FIFRA thus prohibits the sale, distribution, shipment and receipt of any pesticide not labeled under the Act and registered with EPA. 7 U.S.C. § 136a.

Product registration under FIFRA requires a manufacturer to undertake extensive testing and to submit voluminous data to EPA, including, for example, results of studies concerning toxicity, carcinogenicity, mutagenicity, reproductive effects, effects on metabolism and environmental fate. *See* 7 U.S.C. § 136a(c)(2); 40 C.F.R. § 158. *See also Ruckelshaus*, 467 U.S. at 998. After reviewing the manufacturer's data, along with additional information obtained from EPA's own data gathering analysis or from public hearings, 7 U.S.C. §§ 136a(c)(4), 136r, 136s, EPA may then register a pesticide product only if it determines that:

> (i) the product's composition is such as to warrant the proposed claims for it;
>
> (ii) it will perform its intended function without unreasonable adverse effects on the environment (including man, animals, plants, water, air, land, and the interrelationships among them);

(iii) when used in accordance with widespread and commonly recognized practice, it will not generally cause unreasonable adverse effects on the environment; and

(iv) its labeling and packaging comply with FIFRA and its implementing regulations.

See 40 C.F.R. § 152.112; 7 U.S.C. §§ 136a(c)(5), 136(j).

With respect to labeling, FIFRA imposes stringently detailed requirements.[2] Thus, EPA's implementing regulations control:

(i) the contents of the label, requiring that it "clearly and prominently" display:

(a) name, brand or trademark;

(b) name and address of registrant;

(c) net contents;

(d) product registration number;

(e) producer's registration number;

(f) ingredient statement;

(g) warning or precautionary statements;

(h) directions for use; and

(i) use classifications;

(ii) label prominence, requiring that information be "placed with such conspicuousness" and "expressed in such terms" that it is "likely to be read and understood by the ordinary individual under customary conditions of purchase and use;"

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[2] FIFRA defines "label" to mean "the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers." 7 U.S.C. § 136(p)(1). The term "labeling" is in turn defined as "all labels and all other written, printed, or graphic matter . . . (A) accompanying the pesticide . . . at any time; or (B) to which reference is made on the label or in literature accompanying the pesticide . . . ." 7 U.S.C. § 136(p)(2).

(iii) label legibility, including type size and clarity;

(iv) language to be used;

(v) placement of the label; and

(vi) label accuracy, so that a product is "misbranded" (subjecting the registrant to civil and criminal penalty) "if its labeling is false or misleading in any particular, including both pesticidal and nonpesticidal claims."

40 C.F.R. § 156.10(a).

Moreover, the regulations *require* certain prescribed hierarchical "front panel" warnings and precautionary statements. 40 C.F.R. § 156.10(h). These warnings include, *inter alia*:

(i) specified human hazard signal words, prescribed according to degree of toxicity, as defined in the regulations;

(ii) uniform child hazard warnings;

(iii) statements of practical treatment;

(iv) statements of hazard to humans and domestic animals, including precautionary statements identifying route(s) of exposure and means of accident prevention;

(v) statements of environmental hazards; and

(vi) specific statements of physical or chemical hazards.

40 C.F.R. § 156.10(h).

Approved labels must also contain "conspicuous" directions for use of the pesticide "which can be easily read and understood by the average person likely to use or to supervise the use of the pesticide." 40 C.F.R. § 156.10(i). EPA must find the directions "adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment." *Id.* FIFRA requires the listed directions to include:

(i) application site;

(ii) target pests;

(iii) dosage rates;

(iv) application method;

(v) application timing and frequency;

(vi) limitations on reentry to the application site;

(vii) storage and disposal information; and

(viii) limitations or restrictions on use.

40 C.F.R. § 156.10(i)(2).

As amended in 1972 FIFRA also carefully delineates the role of the States and State law. *See Wisconsin Public Intervenor*, 111 S. Ct at 2476. Thus, for example, a State may under specified conditions, provide registration for additional uses of federally registered pesticides to meet special local needs. 7 U.S.C. § 136v(c). A State may also regulate the "sale or use" of a federally registered pesticide so long as it does not permit any sale or use otherwise prohibited by EPA. 7 U.S.C. § 136v(a). As to labeling, however, the statute is categorically preemptive:

(b) Uniformity

> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v(b). It is this provision upon which the decisions below rested.

2. Velsicol is the manufacturer of Gold Crest Termide, a termiticide concentrate that Velsicol duly registered with EPA in 1975. The product label approved by EPA in 1975 specified two approved methods of application and instructed that the product was to be applied only as specified on the label. In 1979 a third-party pes-

ticide applicator misapplied Velsicol's product to petitioners' partially constructed residence in a manner not permitted by the label.[3] As a result of the misapplication, petitioners claim they were harmfully exposed to the product.

Petitioners thereafter filed suit against both the applicator and Velsicol, asserting various tort claims under the Nevada common law of negligence and strict liability. After settling with the applicator, petitioners sought to pursue their claims against Velsicol, urging, *inter alia*, that the EPA-approved product label was inadequate. In January 1991 petitioners asked the trial court, by motion *in limine*, to rule that a post-application change in the product label would be admissible at trial as evidence of the 1975 label's inadequacy.[4] Velsicol opposed petitioners' motion and itself filed a motion *in limine* asking the trial court to rule that any claims challenging the adequacy of the Gold Crest Termide label were preempted by FIFRA.

On April 5, 1991 the District Court denied petitioners' motion and granted Velsicol's motion, ruling that FIFRA preempts petitioners' claims based on inadequate labeling. Pet. 21a-23a. Thereafter, by Order dated June 5, 1991 the District Court declined to reconsider its preemption ruling, certified the April 5 Order for interlocu-

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[3] The EPA-approved label specified below-ground application of the product in crawl space areas by "rodding" or "trenching." By contrast, the applicator "broadcast sprayed" the product above the ground in an area intended for crawl space construction. Use of a product in a manner inconsistent with the label is sanctionable under FIFRA. *See* 7 U.S.C. §§ 136j(a)(2)(G), 136*l*.

[4] In 1980 Velsicol obtained EPA approval of a new label for Gold Crest Termide. Like the 1975 label, the label approved in 1980 permitted application by rod or trench below the ground in crawl space construction and instructed against any other methods of application. In addition, however, the 1980 label specifically identified broadcast spraying as one of the other methods not permitted in crawl space areas.

tory appeal to the Nevada Supreme Court, and stayed trial of petitioners' remaining, non-label based claims pending resolution of the appeal. Pet. App. 26a-32a.

On August 12, 1992—some six weeks after the decision in *Cipollone*—the Nevada Supreme Court announced its decision affirming the District Court's preemption ruling. Pet. App. 1a-19a. The Nevada Supreme Court reasoned, first, that it could not rest a finding of express preemption on the words of § 136v(b) because that section does not specifically identify common law remedies as among the "requirements" States are precluded from imposing. Pet. App. 8a. The court nevertheless examined in detail the legislative history of that section and its place in the overall statutory structure, Pet. App. 10a-13a, and concluded:

> First, the excerpts from the legislative history demonstrate that Congress intended section 136v(b) to "completely pre-empt" State authority to change federal labeling. . . . Second, it is unlikely that Congress would have designated federal control over labeling in section 136v(b) if it thought that the provision could be circumvented by State action authorized by § 136v(a). Third, federal regulation of pesticide labeling created by FIFRA is "so pervasive" and "so dominant" such that Congress left no room for the States to supplement it.

Pet. App. 14a (citation and footnote omitted). The court further concluded that "a jury determination that a label is inadequate would directly conflict with the EPA determination that the label is adequate," Pet. App. 17a, and that "[n]ational uniformity in pesticide labeling would also be frustrated by state common law tort claims." Pet. App. 18a. Accordingly, it held petitioners' inadequate labeling claims preempted under FIFRA.[5] On No-

[5] In its opinion the Nevada Supreme Court candidly expressed difficulty in applying *Cipollone*'s analytical framework. Pet. App. 6a n.2. As a consequence, its preemption holding was framed as a

vember 3, 1992 the court denied rehearing. Pet. App. 33a.

REASONS FOR DENYING THE WRIT

1. The Court's jurisdiciton to review state court decisions is limited under 28 U.S.C. § 1257(a) to "final judgments or decrees rendered by the highest court of a state." That limitation has generally been held "to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

In this case, the Nevada Supreme Court rendered its decision on an interlocutory appeal (*see* Pet. App. 1a) from the trial court's order dismissing some, but not all, of petitioners' claims. Pet. App. 26a-32a. The only claims dismissed were those "based upon the alleged inadequacies of VELSICOL's labeling of its product." Pet. App. 29a. Petitioners' non-label based claims remain pending before the District Court, with pre-trial and discovery matters stayed pending resolution of the interlocutory appeal. Pet. App. 31a. Because those claims remain to be determined by the State court, it follows that a "final judgment[] or decree[]" has not yet been rendered in this case for jurisdictional purposes under 28 U.S.C. § 1257(a).[6]

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holding of implied, rather than express, preemption. Pet. App. 14a, 18a. The analysis that led the court to that conclusion, however, closely tracks the analysis undertaken by the Court in *Cipollone*, and the result is the same as that reached by the Tenth and Eleventh Circuits in the only other post-*Cipollone* appellate decisions on this issue. As further demonstrated *infra*, pp. 14-20, that result is clearly correct. The Nevada court's use of the terminology of implied preemption analysis, even if inconsistent with *Cipollone*, is therefore of no significance.

[6] In its June 5, 1991 Order, the District Court characterized the April 5, 1991 Order as having granted partial summary judgment on petitioners' label-based claims (Pet. App. 29a) and certified the

The Court has, in some cases, treated State court judgments as final for jurisdictional purposes even though further State court proceedings would take place. *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469 (1975), identified four categories of such cases. The present case fits none of them.

The first two categories outlined in *Cox* involve cases where the federal issue at stake "would not be mooted or otherwise affected by the proceedings yet to be had" at the State court level, *id.* at 478, because either (a) "the federal issue is conclusive or the outcome of further proceedings is preordained," *id.* at 479, or (b) the federal issue "will survive and require decision regardless of the outcome of further State court proceedings." *Id.* at 480. Neither circumstance is present here. The Nevada Supreme Court's preemption ruling is not determinative of the outcome at trial of petitioners' remaining, non-label based claims, and if petitioners prevail at trial of those claims, the federal issue will become moot. Thus, the preemption question may not survive the further State proceedings.

In the third *Cox* category are cases where "the federal claim has been finally decided, with further proceedings

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April 5 ruling as a "final order for interlocutory appeal" under the Nevada analogue to Fed. R. Civ. P. 54(b). Pet. App. 30a-31a. The District Court's certification does not, however, render the decision a "final judgment or decree." Even under the Federal Rules, entry of partial summary judgment on one or more of several alternative theories of relief does not represent an appealable final order under 28 U.S.C. § 1291, *Cheng v. Commissioner, IRS*, 878 F.2d 306, 309 (9th Cir. 1989), even if entered as a separate judgment under Fed. R. Civ. P. 54(b). *Horn v. Transcon Lines, Inc.*, 898 F.2d 589, 593 (7th Cir. 1990). In any event, "finality" for the purpose of 28 U.S.C. § 1257 jurisdiction is a question of federal law, and the State's characterization of the order appealed from as "final"—or not—is not dispositive. *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 72 (1946). In this case, for the reasons cited in text, the decision of the Nevada Supreme Court does not represent a final judgment or decree, as this Court has construed 28 U.S.C. § 1257 in prior cases.

on the merits in State courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S. at 481. Here, if petitioners prevail at trial of their remaining claims, the federal issue will become moot. On the other hand, if they lose at trial, petitioners will be able then to seek this Court's review of the preemption ruling, even assuming the Nevada Supreme Court refuses to reconsider the issue as law of the case. *Hathorn v. Lovorn*, 457 U.S. 255, 261-62 (1982); *Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964); *Reece v. Georgia*, 350 U.S. 85, 87 (1955); *Urie v. Thompson*, 337 U.S. 163, 171-72 (1949). Thus, petitioners do not fall within the third category of *Cox*.

The final *Cox* category includes cases "where reversal on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . [and] a refusal immediately to review the State court decision might seriously erode federal policy." 420 U.S. at 482-83. Here reversal on the federal issue would not preclude any further litigation; to the contrary, it would expand the litigation below by reinstating previously dismissed claims. Plainly, this case does not fall within the fourth category identified in *Cox*.

For these reasons, the interlocutory judgment of the Nevada Supreme Court is neither final in the traditional sense, nor does it fit any of the pragmatic exceptions to the traditional finality test identified in *Cox*. The Court, therefore, lacks jurisdiction to grant the petition. *Flynt v. Ohio*, 451 U.S. 619, 621-23 (1981).

2. Petitioners argue that this Court's review is necessary to resolve an irreconcilable split among the lower federal and state courts over whether FIFRA preempts state common law claims of inadequate labeling. Pet. 9-14. This argument suffers from two major defects.

First, the overwhelming majority of the purportedly conflicting cases cited by petitioners are those of federal

and state trial courts or intermediate state appellate courts. This Court does not ordinarily grant review to resolve a conflict between the decision of a state court of last resort and those of lower courts; rather, its review ordinarily is, and properly should be, limited to resolving conflicts between a highest state court's decision of a federal question and decisions of that question by a United States court of appeals or another state court of last resort. *See, e.g.*, S. Ct. R. 10.1(b). Among courts in that category, there was considerable uniformity even before *Cipollone*,[7] and since *Cipollone* there has been complete uniformity, at least of result.

Second, and more importantly, in attempting to draw a portrait of confusion and conflict among the lower courts, petitioners wrongly rely upon decisions before *and* after *Cipollone*. The relevant time period to examine is the period *after* the Court's decision last term of *Cipollone*. It is, after all, that case which enunciated the principles that govern the determination of the effect on

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[7] Prior to *Cipollone*, five United States courts of appeals and one state supreme court had ruled on the preemptive effect of FIFRA on state common law inadequate labeling claims. Four of the five U.S. courts of appeals found in favor of FIFRA preemption; the remaining court of appeals and the single state supreme court held otherwise. *Finding preemption*: *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir. 1992), *on remand*, No. HAR 90-1424, 1992 WL 368062 (D. Md. Nov. 30, 1992), *appeal filed*, No. 93-1003 (4th Cir. Dec. 29, 1992); *National By-Products, Inc. v. Pope*, 959 F.2d 235 (6th Cir. 1992) (table) (opinion available on LEXIS, 1992 U.S. App. LEXIS 6752), *aff'g* Civil Nos. 86-207, 86-397 (E.D. Ky. Mar. 8, 1991); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir.), *vacated and remanded sub nom. Arkansas-Platte & Gulf Partnership v. Dow Chemical Co.*, 113 S. Ct. 314 (1992), *on remand*, 981 F.2d 1177 (10th Cir. 1993); *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *vacated and remanded sub nom. Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992), *on remand*, 985 F.2d 516 (11th Cir. 1993). *Holding against preemption*: *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1985); *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136 (Ark. 1992).

state common law claims of statutory preemption clauses such as § 136v(b) of FIFRA.[8]

Since *Cipollone*, two U.S. Courts of Appeals and the Nevada Supreme Court in this case have addressed the issue, and all three courts have concluded that FIFRA preempts claims such as those presented by petitioners here. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) ("*Papas II*"); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993) ("*Arkansas-Platte II*").[9] Thus, there is no split of authority which requires this Court's resolution.

3. Nor does the decision below implicate an important question of federal law that has not been, but should be, settled by this Court now. To the contrary, the most important issue in the case—the principles which govern determination of the preemptive effect of federal statutes that contain explicit preemption provisions—was decided just eight months ago in *Cipollone*. Petitioners have suggested no reason, and none exists, for this Court to revisit *Cipollone* so soon.

Moreover, unless the Court is regularly to revisit *Cipollone* on a statute-by-statute basis, no reason exists for the Court to intercede with respect to FIFRA. As noted

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[8] As a consequence, pre-*Cipollone* cases on both sides of the preemption issue are of somewhat diminished significance. Thus, while the pre-*Cipollone* appellate courts that found preemption did so on the basis of *implied* preemption analysis, rather than the *express* preemption analysis apparently required under *Cipollone*, the analysis reflected in *Ferebee* and *Ciba-Geigy* is likewise inconsistent with the principles set forth in *Cipollone*, as the U.S. Court of Appeals for the Fifth Circuit recently pointed out in *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1425 n.9 (5th Cir. 1993).

[9] Even if the Court were to accept petitioners' invitation to examine both trial court and appellate decisions (Pet. 11), since *Cipollone* the decisions at all court levels are nearly unanimous in result: thirteen of fourteen courts to rule have concluded that claims such as petitioners' are preempted by FIFRA. *See* Pet. 11 and *Papas II*.

above, both federal courts of appeals that have addressed FIFRA's preemptive effect since *Cipollone* reached the same result as the court below, and the issue of FIFRA's preemptive effect on state common law claims is pending in cases before the First, Fourth and Ninth Circuits.[10] Should the decisions in those cases reveal any particular problems or significant inconsistencies, the Court can decide then whether its review is warranted. The Court's intercession now is unnecessary and premature.

4. In any event the result reached by the Court below was correct and fully consistent with *Cipollone*.[11] Petitioners do not dispute that § 136v(b) of FIFRA expressly preempts positive state enactments (such as statutes or

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[10] *Worm v. American Cyanamid Co.*, No. HAR-90-1424, 1992 WL 368062 (D. Md. Nov. 30, 1992), *appeal filed*, No. 93-1003 (4th Cir. Dec. 30, 1992); *King v. E.I. duPont de Nemours & Co.*, 806 F. Supp. 1030 (D. Me. 1992), *appeal filed*, No. 92-2381 (1st Cir. Nov. 20, 1992); *Montana Pole & Treating Plant v. I.F. Laucks & Co.*, 775 F. Supp. 1339 (D. Mont. 1991), *appeal filed*, No. 91-36024 (9th Cir. Sept. 13, 1991).

[11] Petitioners make much of the fact that the Nevada Supreme Court ultimately rested its conclusion on a finding of *implied* preemption, while this Court in *Cipollone* instructed that, when Congress has explicitly addressed the issue of preemption in a provision that provides a reliable indicium of congressional intent with respect to state authority, the court should limit its analysis to the express terms of that provision. 112 S. C. at 2618. Pet. 15-16, 20. It bears noting, however, that the Nevada Supreme Court decided against *express* preemption based solely upon the absence of an explicit reference to state common law remedies in § 136v(b). Pet. App. 8a-9a. Its holding in this regard was equally inconsistent with *Cipollone*, which based a finding of express preemption on closely similar statutory phrasing in the federal cigarette labeling statute that likewise contained no explicit reference to state common law remedies. *See* 112 S. Ct. at 2617. Moreover, as noted *supra*, page 8 n.5, the opinion below contains all of the elements of the analysis called for by *Cipollone*; it merely addressed them under the rubric of implied preemption. That linguistic confusion is scarcely a basis for this Court's review, *see Miroyan v. United States*, 439 U.S. 1338 (1978), or for the more drastic remedy of summary reversal requested by petitioners. Pet. 16.

regulations) related to labeling or packaging. *See* Pet. 17. *Cf. Wisconsin Public Intervenor*, 111 S. Ct. at 2486. Rather, the point in contention is whether state common law inadequate labeling claims are also preempted.

The answer to that question is given by the plain words of § 136v(b), which—in a subsection titled, "Uniformity" —broadly prohibit states from imposing or continuing in effect "any requirement"—not just positive enactments— "for labeling or packaging." The phrasing of § 136v(b) is nearly identical to that the Court found preemptive in *Cipollone* ("no requirement or prohibition . . . shall be imposed"), 112 S. Ct. at 2617, notwithstanding the same argument petitioners make here, that only positive enactments are encompassed by the phrase "no requirement or prohibition":

> Petitioner . . . argues that common law damages actions do not impose "requirement[s] or prohibition[s]" and that Congress intended only to trump "state statute[s], injunction[s], or executive pronouncement[s]." We disagree; such an analysis is at odds both with the plain words of the 1969 Act and with the general understanding of common law damages actions. The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

Cipollone, 12 S. Ct. at 2620. *Accord International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987).

Relying expressly on *Cipollone* the Tenth Circuit concluded that § 136v(b)'s prohibition of "any" requirement

is the functional equivalent of the section 5(b) of the Public Health Cigarette Smoking Act and rejected the notion that FIFRA's preemptive effect extends only to positive state enactments:

> While plaintiff argues a congressional preemption of state law extends to positive legislative acts only, we do not agree. When one looks to the purpose underlying both legislative regulation of labeling and packaging and a state common law duty to warn, it becomes evident those purposes are the same. Indeed, a state common law duty to warn is nothing more than a duty to label a product to provide information. In that sense, the common law duty is no less a "requirement" in the preemption scheme than a state statute imposing the same burden. . . . Both address a manufacturer's duty to convey information about a product through the medium of a label. . . . Therefore, we believe it only logical to hold that the common law duty to warn is subjected to the same federal preemptive constraints as a state statute.

Arkansas-Platte II, 981 F.2d at 1179. *Accord Papas II*, 985 F.2d at 518 ("*Cipollone* convinces us that the term 'requirements' in section 136v(b) 'sweeps broadly and suggests no distinction between positive enactments and the common law.' "). The plain wording of § 136v(b) thus reaches common law claims as well as positive state enactments.[12]

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[12] In arguing to the contrary, petitioners contend that the phrase "Such State" in § 136v(b) refers back to § 136v(a), which is limited to state "regulation." Pet. 17. Leaving aside the point noted in text above, that "regulation" can be achieved as easily through common law damages as through so-called positive enactments, it is sufficient answer to petitioners to note, first, that the word "Such" in § 136v(b) modifies "State," not "requirements," and, second, that if Congress had intended to limit § 136v(b) to positive state enactments, it could have used the term "regulation" in § 136v(b), as it did in § 136v(a). Instead, it used the far broader phrase, "any requirements." The choice of those two different terms in close

The legislative history of the 1972 amendments upon which the court below relied (Pet. App. 10a-11a, 14a) confirms the conclusion that § 136v(b) "sweeps broadly" and was intended to reach common law labeling requirements. Thus, the House Committee Report accompanying the original bill stated:

> The States are given prime responsibility for the certification and supervision of pesticide applicators. The Federal Government sets the program standards the States must meet. *State authority to change Federal labeling and packaging is completely preempted*, and State authority to further regulate "general use" pesticides is partially preempted.

H.R. Rep. No. 92-511, 92nd Cong., 1st Sess. 1-2 (1971) (emphasis added). *See also id.* at 16 (". . . the Committee has adopted language to completely prempt State authority in regard to labeling and packaging"). The Senate Reports were to the same effect. *See* S. Rep. No. 838, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4021; S. Rep. No. 970, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4092, 4128.[13] As the court below concluded, these excerpts "demonstrate that Congress intended § 136v(b) to 'com-

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juxtaposition must be considered intentional. *Russello v. United States*, 464 U.S. 16 (1983). Contextual analysis thus confirms that Congress meant § 136v(b) to reach requirements imposed under common law as well as those imposed under other sources of state law.

[13] These passages answer petitioners' effort to distinguish *Cipollone* on the ground that the legislative history of the cigarette labeling statute revealed more specific congressional intent to encompass common law claims than does that of FIFRA. Pet. 17-18. In fact, the Court noted in *Cipollone* that portions of the legislative history at issue there suggested "that Congress was primarily concerned with positive enactments by States and localities." 112 S. Ct. at 2620. To that degree FIFRA's legislative history provides even stronger support for the natural reading of § 136v(b)'s words than did the legislative history involved in *Cipollone*.

pletely preempt' state authority to change federal labeling." Pet. App. 14a.[14]

Petitioners nevertheless point out that EPA may find a pesticide to be misbranded under FIFRA, even if EPA has previously approved the label, 7 U.S.C. § 136(q)(F)-(G), if the label does not contain a warning adequate to protect health and the enviromnent—apparently suggesting that the fact that EPA is free to second-guess its own determination of label adequacy under FIFRA (presumably on the basis of new information) somehow leaves room for each of the fifty states at any time to determine under its own common law whether the EPA-approved label is in fact adequate to protect health and the environment. Pet. 18. Such common law determinations of label adequacy, however, would plainly be "in addition to or different from" EPA's determination under FIFRA, and allowing them would, as the court below

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[14] Petitioners' assertion that Congress "ratified" the D.C. Circuit's 1984 non-preemption holding in *Ferebee* when it revised FIFRA in 1988 without changing the wording of § 136v(b) is simply wrong. Pet. 19. While the Court has cautioned that Congress is presumed, when it legislates, to take into account "the contemporary legal context," a particular judicial result is treated as part of that context only when it reflects the "routine[] and consistent[]" holdings of numerous judicial decisions. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 379-81 (1982). It is doubtful that a single decision could satisfy that test; in any event, by 1988 there was no judicial consensus in the issue of FIFRA preemption. *Ferebee* was counterposed by other decisions finding preemption—*see, e.g., Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987); *Stiltjes v. Dettlebach Pesticide Corp.*, 343 S.E.2d 715 (Ga. App.), *aff'd on other grounds*, 347 S.E.2d 568 (Ga. 1986)—and there is no indication in the legislative history of the 1988 amendments that Congress favored the *Ferebee* viewpoint. To the contrary, Congress' 1988 addition of the heading "Uniformity" to § 136v(b) more strongly suggests that Congress agreed with those cases finding preemption of common law claims.

observed (Pet. App. 18a), defeat the "Uniformity" Congress sought to achieve by § 136v(b).[15]

As the court below noted, Pet. App. 12a-14a, the logic for preemption of common law claims in this narrow area is clear from the statutory scheme. Far from giving pesticide manufacturers "wide latitude to decide the language of pesticide labels," Pet. 18, FIFRA prescribes the scope, content, wording and format of product labels, including warning statements, in excruciating detail. *See generally* 40 C.F.R. § 156. For example, the implementing regulations dictate which of four signal words must be used on the label depending upon the toxicity rating of the pesticide, 40 C.F.R. § 156.10(h)(1), and the manufacturer cannot use either more than one signal word or one associated with a higher toxicity category. 40 C.F.R. § 156.10(h)(1)(i)(E). Thus, for example, Velsicol could *not* add the word "Poison" or place a skull-and-crossbones on the label of Gold Crest Termide—even if a state court jury found the label inadequate without it—because the product is not sufficiently toxic to warrant such a warning.[16]

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[15] Faced with similar arguments on remand following this Court's decision in *Cipollone*, the Eleventh Circuit responded:

> Those allegations, like the failure to warn claims in *Cipollone*, require the finder of fact to determine whether, under state law, [the manufacturer] adequately labelled and packaged its product. This inquiry is precisely what section 136v(b) forbids. FIFRA denies states the authority to require that pesticide manufacturers conform to a state law standard of care in their labelling and packaging practices. Thus, to the extent that [a plaintiff's] claims require a showing that [the manufacturer's] labelling or packaging "should have included additional, or more clearly stated, warnings, those claims are preempted." *See Cipollone*, 505 U.S. at ——-——, 112 S. Ct. at 2621-22.

Papas II, 985 F.2d at 518.

[16] Petitioners' description of the label drafting and approval process, Pet. 19, is thus misleading. While it is true that it is the registrant who "drafts" the label in the first instance, the drafting is done pursuant to highly detailed instructions. Likewise, while a

These requirements, and similar others laced throughout the labeling regulations, *see* Pet. App. 13a, led the court below to conclude:

> . . . [A] jury determination that a label is inadequate would directly conflict with the EPA's determination that the label is adequate to protect man and the environment. National uniformity in pesticide labelling would also be frustrated by state common law tort claims. Therefore we hold that these claims are preempted. . . .

Pet. App. 17a-18a. This conclusion is fully consistent with *Cipollone* and with the decisions of the only two courts of appeals that have addressed *Cipollone*'s effect on FIFRA preemption issues.

There is no dispute that the claims found preempted in the proceedings below squarely challenged the adequacy of Velsicol's EPA-approved label. That being so, they clearly sought to impose a "requirement for labeling or packaging in addition to or different from" those imposed under FIFRA. The Nevada Supreme Court, therefore, properly held that those claims are preempted under § 136v(b) of FIFRA. There is no error for this Court to correct.

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registrant may decide to seek EPA's approval to change the label, such a change may also be independently *required* by EPA in the exercise of its continuing oversight of label adequacy, *see* 40 C.F.R. § 152.130(d), and in any event "no change in . . . precautionary statements or directions for use" may be made without prior EPA approval. *See* 40 C.F.R. § 152.46(a)(1).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: April 2, 1993

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Supreme Court, U.S.

No. 92-1430

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

ERNEST DAVIDSON, DARLENE DAVIDSON,
Individually and as Guardians ad Litem of
SHERENE DAVIDSON AND ERNEST DAVIDSON, JR.,
their minor children,
Petitioners,

v.

VELSICOL CHEMICAL CORPORATION, an
Illinois Corporation,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Nevada

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Velsicol concedes that the Nevada Supreme Court found that FIFRA *does not* expressly preempt plaintiffs' labeling claims and that, under *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), it should have limited its analysis to that issue. *See* Brief in Opposition (Opp.) at 8 n.5, 14 n.11. Nevertheless, Velsicol offers four reasons why this Court should deny *certiorari*. All of those reasons are lacking in merit.

1. This Court's Jurisdiction Is Entirely Proper.

First, Velsicol contends that this Court lacks jurisdiction to grant *certiorari*. Opp. at 9. In *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 479 (1975), however, this Court held that jurisdiction is entirely proper in a case where "the federal issue is conclusive or the outcome is preordained." This is just such a case, as Velsicol acknowledged below.

The Davidsons' amended complaint seeks relief under Nevada state common law claims of negligence and strict liability. Both claims are based on allegations of failure to warn. Petition for A Writ of Certiorari (Pet.) at 4. After the trial court ruled that FIFRA impliedly preempts state common law tort actions based on an inadequate labeling theory, Velsicol opposed rehearing, but did not oppose the Davidsons' motion to certify for interlocutory appeal. Instead, contrary to its current contention that additional claims "remain to be determined by the State court", Opp. at 9, Velsicol itself asserted that the FIFRA preemption ruling is "probably dispositive of -- the presentation of plaintiffs'

case." Opposition to Motion for Rehearing and Reconsideration at 4.

The trial court was of the same view. Granting the motion to certify, it said the appeal involved a "fundamental legal issue underlying Plaintiff's product liability and negligence claims against Defendant Velsicol". Pet. App. at 30a.

In *Cox, supra* at 478-79, this Court recognized that, to avoid the "mischief of economic waste and of delayed justice", jurisdiction may be taken in those cases where the litigation is "for all practical purposes concluded". This principle applies even where there are "entire trials yet to occur in the state courts" if, because of the way the federal question was resolved, the "proceedings [will] have little substance". *Id.* In this case, there is simply no useful purpose to be served by requiring the Davidsons to go back to the trial court and then return to this Court with the exact same issue -- an issue that even Velsicol concedes the Nevada Supreme Court erred in analyzing. This Court's jurisdiction, therefore, is entirely proper.

2. The Conflict is Real and Growing.

Velsicol's second contention is that, despite the extensive conflict among the lower courts over FIFRA's preemptive effect, "there is no split of authority which requires this Court's resolution." Opp. at 13. Velsicol dismisses the findings of no express preemption in both *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1539 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984), and *Ciba-Geigy Corp. v. Alter* (*Alter*), 834 S.W.2d 136 (Ark.1992), solely because they were issued before *Cipollone*. It further claims

that trial court decisions are insignificant and, incredibly, asserts that "since *Cipollone*, there has been complete uniformity, at least of result." Opp. at 12.

In fact, what the pre-and-post-*Cipollone* trial and appellate decisions prove (including the decision in this case) is that *Cipollone* did *not* resolve the conflict among the lower courts. Indeed, in several instances since *Cipollone*, courts have expressly disagreed with the result reached in other cases. *See, e.g., Levesque v. Miles, Inc.*, 1993 US.Dist. LEXIS 3395, * 25 (D.N.H. Mar. 18, 1993) (disagreeing with *Papas v. The Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) (*Papas II*)); *MacDonald v. Monsanto Co.*, 1993 WL 49898 (E.D.Tex. Feb. 25, 1993)(disagreeing with *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993) (*Arkansas-Platte II*)); *Gibson v. Dow Chemical Co.*, CV 92-30 (E.D. Ky. Oct. 19, 1992), slip. op. at 5 (disagreeing with *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992), *vacated and remanded,* 113 S. Ct. 314 (1992), *re-aff'd, Arkansas-Platte II*)[1].

As two recent decisions, *Papas II* and *MacDonald*, plainly demonstrate, the conflict is real and growing. The former involved a man who contracted benzene-induced anemia after being exposed to a pesticide manufactured by the defendant. *Papas II at 517.* Although the pesticide contained benzene, its label did not mention that fact. *Id. at 518.* Seeking damages under Florida common law, the man and his family sued the manufacturer for, among other things, failure to warn. *Id.* In addition, they alleged that, in

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[1] We understand that the plaintiffs in both *Papas II* and *Arkansas-Platte II* will be seeking review again by this Court in the near future.

seeking approval for the pesticide's label from the Environmental Protection Agency (EPA), the manufacturer failed to disclose that the pesticide contained benzene. *Id.*

Reconsidering the case on remand from this Court in light of *Cipollone*, the Eleventh Circuit held that FIFRA expressly preempts all claims based on failure to warn theories. *Id.* at 520. This holding directly conflicts with both *Ferebee* and *Alter*, as well as with the decision of the Nevada Supreme Court below.

The Eleventh Circuit also specifically rejected the plaintiffs' contention that the defendant could be held liable because of its misrepresentations to the EPA. It ruled that FIFRA "leaves states with no authority to police manufacturers' compliance with federal procedures". *Papas II* at 519. This ruling directly conflicts with the Fourth Circuit's holding in *Worm v. American Cyanamid*, 970 F.2d 1301, 1308 (4th Cir. 1992), *on remand*, No. HAR 90-1424, 1992 WL 368062 (D.Md. Nov. 30, 1992), *appeal filed*, No. 93-1003 (4th Cir. Dec. 29, 1992), that state actions which seek compensation for violations of federal law are not preempted by FIFRA.

Finally, the Eleventh Circuit ruled that the plaintiffs' claims for failure to warn in literature or postings beyond the label (such as point-of-sale signs or consumer fact sheets) are expressly preempted by FIFRA. *Papas II* at 519. This ruling directly conflicts with rulings of the Second and Ninth Circuits that § 136 v(b) of FIFRA, which refers to "labeling", does not preempt state law in regard to off-label information about the product, including point-of-sale signs and consumer notices. *Chem. Specialties Mfrs. Ass'n v. Allenby*, 958 F.2d 941 (9th Cir.), *cert. denied*, 113 S.Ct. 80

(1992); *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115 (2d Cir. 1989). *See also*, *Levesque v. Miles, Inc.*, *supra* (explicitly disagreeing with *Papas II* and holding that, if warnings apart from labels or packaging should have been used, the defendant can be held liable).

In *MacDonald*, the plaintiff was diagnosed with medical problems stemming from exposure to the defendant's herbicide. *Id.* at *1. He alleged that defendants' labeling was inadequate under Texas common law. *Id.* The court, applying an express preemption analysis after *Cipollone*, held that plaintiff's claims were not preempted and that FIFRA only preempts "state regulatory requirements." *Id.* at *3. In so holding, it specifically rejected the reasoning of *Arkansas-Platte II*, stating that the Tenth Circuit (1) failed to address the presumption against preemption, (2) disregarded *Cipollone*'s teaching that "there is no inherent conflict between federal preemption of state warning requirements and the continued validity of state common law damage actions", (3) failed to take into account the significant difference between the cigarette acts at issue in *Cipollone* (which mandated specific wording) and FIFRA (which does not), and (4) misconstrued FIFRA's express preemption provision. *MacDonald* at *3-*4.

As these cases make clear, further lower court review of the FIFRA preemption issue is only leading to *more* conflict, not, as Velsicol argues, "uniformity." This Court should resolve the growing conflict now.

3. *The Federal Question Presented Here is Extremely Important.*

Velsicol's third contention is that there is no need for review because what it calls "the most important issue" -- the principles governing preemption analysis -- was decided in *Cipollone* and there is no need for this Court "regularly to revisit *Cipollone* on a statute-by-statute basis". Opp. at 13. Even Velsicol concedes, however, that, in this case, the Nevada Supreme Court failed to follow the principles set forth in *Cipollone*. Opp. at 8 n.5, 14 n. 11. That is not because the Court below did not try. It said, "We do not find *Cipollone* instructive." Pet. App. 6a. Thus, the decision below and the other cases we have cited only confirm that *Cipollone* did not adequately resolve what Velsicol calls "the most important issue" and that the lower courts need further guidance. Pet. at 9-14.[2]

Equally important, Velsicol's attempt to minimize the need for statute-by-statute review in light of *Cipollone* plainly reflects *its* misreading of that case. If *Cipollone* makes anything clear, it is that determination of a statute's preemptive effect requires statute-specific analysis. Velsicol attempts to portray FIFRA's preemptive effect as a relatively unimportant issue, when, in fact, it is critically important -- to the State, the federal government, the Davidsons, the pesticide manufacturers, and pesticide poisoning victims throughout the nation.

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[2] *See also The Supreme Court -- Leading Cases*, 106 Harv. L. Rev. 163, 355-357 (1992), concluding that "two [FIFRA] preemption decisions in the wake of *Cipollone* indicate the need for clarification" and noting that "the [*Davidson*] court ignored *Cipollone*'s clearest directive ...[and]... misapplied *Cipollone*".

4. The Court Below Reached the Wrong Result.

Velsicol's final argument is that *certiorari* should be denied because, even though the Nevada Supreme Court violated the principles set forth in *Cipollone*, it nevertheless reached the right result. Opp. at 14. As we demonstrated in our petition, however, that simply is not so. Velsicol's argument that FIFRA expressly preempts plaintiffs' labeling claims is fatally flawed.

To begin with, Velsicol's extensive reliance on regulations promulgated by the EPA under FIFRA is misplaced. At bottom, the regulations show that the manufacturer is responsible for crafting the label and that the labeling regulations permit variations even among products containing the same active ingredients. *See, e.g., Riden v. ICI Americas, Inc.*, 763 F. Supp. 1500, 1508 (W.D. Mo. 1991). Indeed, in this case, the EPA regulations permitted Velsicol to label its product inadequately and then change the label after the Davidsons were injured.

Moreover, Velsicol's suggestion, at 20, that EPA provides adequate oversight over the labeling process is absurd. An audit report released recently by the EPA's Office of the Inspector General concludes, among other things, that "EPA cannot provide the public with assurance that precautionary statements on many pesticide labels are adequate." *Labeling of Pesticides: Report of Audit No. E1EPF1-05-0429-2100613* (Sept. 30, 1992), at ii. It also finds that "[a]lmost half the pesticide labels evaluated had missing or inaccurate precautionary statements" and that "[o]ther pesticides were missing statements restricting usage of the pesticide to certified applicators." *Id.*

Velsicol's argument that FIFRA's § 136v(b) is the "functional equivalent of section 5(b) of the Public Health Cigarette Smoking Act" (the 1969 Act) at issue in *Cipollone*, Opp. at 16, is also unpersuasive. The two acts are functionally quite different. As the court noted in *Riden, supra* at 1588 (citation omitted):

> Unlike the cigarette act, which regulates only one product, FIFRA regulates 50,000 products -- the number of products registered under the Act. These pesticides represent 600 distinct active ingredients. To replicate the cigarette act's labeling scheme, the EPA would have to devise labels corresponding to each of the 600 active ingredients represented. Clearly, this would be an onerous task.

Velsicol also attempts to explain away the significance of the reference to "Such State" in § 136v(b), which refers back to a State that is "regulat[ing]" under § 136v(a), by arguing that "regulation" can be achieved as easily through common law damages as by positive enactments. Opp. at 16 n.12 As this Court made clear in *Cipollone*, however, that argument will not stand. "The term 'regulation' most naturally refers to positive state enactments." *Cipollone*, at 2619.

Similarly, contrary to Velsicol's contention, at 16, the holding in *Cipollone* did not rest solely on Congress's use of the word "requirement" in the 1969 Act. The *Cipollone* plurality viewed as determinative not the use of the word "requirement" (as opposed to the use of the words "statement" and "require" in the 1965 Act), but Congress's overall *expansion* of language from the 1965 Act to the 1969 Act and the fact that Congress had purposefully broadened

the scope of the Act's preemption provision during the legislative process. *Cipollone* at 2620-2621. Indeed, *Cipollone's* plurality opinion explicitly stated that, in another context, the presumption against preemption might "give good reason" to limit the 1969 Act's language only to positive enactments by state legislatures and agencies. *Id.*

FIFRA's legislative history, in contrast, reveals no evidence indicating that Congress intended to preempt common law damages actions. *See, e.g.*, Pet. at 19. Velsicol errs in relying on the words "to change federal labeling and packaging" in a House Committee Report to argue otherwise. The full sentence in the report reads as follows: "State authority to change federal labeling and packaging is completely preempted, and State authority *to further regulate* 'general use' pesticides is partially preempted." Opp. at 17 (emphasis added). Plainly, the words cited by Velsicol apply to regulations, not common law claims.

Finally, Velsicol fails to explain how plaintiffs' common law claims impose any requirements that are "in addition to or different from" what is required under FIFRA. *See* Pet. at 18. Velsicol's contention that state common law verdicts would defeat the "uniformity" intended by Congress for pesticide labeling is simply not true. Opp. at 18. In fact, if Velsicol to decided to change its label in response to an adverse verdict, it would just follow the same procedures that it followed in 1980, when it decided to modify the product label at issue in this case. Pet. at 3. Far from precluding such revisions, FIFRA requires such changes when they are necessary to adequately protect humans and the environment. Pet. at 18. The common law claims

"would neither add to nor differ from EPA's current requirements." *Riden, supra* at 1509.

CONCLUSION

This Court should grant the petition for a writ of *certiorari* or, in the alternative, summarily reverse the Nevada Supreme Court's holding of implied preemption in favor of its initial holding that there is no express preemption under FIFRA.

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